

THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW

THE ROLE OF THE JUDICIARY IN THE
ENFORCEMENT OF HUMAN RIGHTS IN ZAMBIA

By

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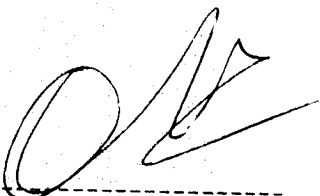
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DECLARATION

I, **JULIUS BIKOLONI SAKALA** a postgraduate student in the School of Law of the University of Zambia **HEREBY DECLARE** that this **THESIS** or any part thereof has not been submitted for a Ph.D degree or at all in this or any other University.

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A B S T R A C T

The principal objective of this study is to examine and evaluate the role of the judiciary in the enforcement of human rights in Zambia. Traditionally, the function of the judiciary is to adjudicate between two or more disputants over an issue or issues brought before the Court by either party.

The prevailing legal framework for the protection, promotion and enforcement of human rights in the country is contained in the Constitution, which is the supreme law of the land. The Bill of Rights is enshrined in Part III of the Constitution. It has been so entrenched since the country attained its independence in 1964.

The Bill of Rights guarantees the protection of fundamental rights and freedoms of the individual regardless of race, place of origin, colour, political opinion, sex or status in society. The Bill lays emphasis on civil and political rights and is fashioned on what is commonly known as the Neo-Nigerian style where most rights and freedoms of the individual are encumbered by derogations or exception clauses.

The Constitution vests judicial power in the Supreme Court, the High Court, the Industrial Relations Court, the Subordinate Court, the Local Courts and such lower Courts as may, from time to time, be prescribed by an Act of Parliament. However, the High Court is given original jurisdiction to hear and determine any matter arising out of alleged violation or threatened violation of human rights.

In addition to the Courts, the Constitution has provided for the establishment of the Human Rights Commission. This Commission has now been created under Act No. 39 of 1996. The Commission is an added institutional mechanism for the protection and promotion of human rights but it is not a Court.

The Constitution has also provided for **Directive Principles of State Policy** in respect of issues relating to a social order based on democratic governance. The principles also relate to the creation of an environment in which citizens can secure adequate facilities for the promotion of health, employment, education and decent shelter.

However, these principles are not justiciable, meaning that one cannot sue the State if it does not provide or make them available.

The focus of this thesis, as already stated, is on the judicial enforcement of such human rights as are available under the law of the land. Paper guarantees of human rights are illusory if they are not capable of enforcement.

The return to multi-party politics in 1991 with its emphasis on democratic governance, heightened the quest for the enjoyment of individual liberties and freedom in the country. The observance of human rights is now being seen as a condition precedent to democratic governance.

Under the new dispensation, Zambia which has ratified both the Universal Declaration of Human Rights and the African Charter on Human and People's Rights, has a duty to exalt and provide effective institutional and legal frameworks for the protection of fundamental human rights. The judiciary is certainly the most effective framework among various mechanisms that the State has put in place in its desire to promote human rights.

The judiciary can, however, only play an effective role through courageous human rights 'activism' and a generous interpretation of the provisions of the Bill of Rights

This study is not intended to be a treatise on the judiciary and human rights in Zambia. However, a thesis of this type is certainly bound to animate worthwhile discussion on the pivotal role of the judiciary in the enforcement of human rights. The citizen, especially the indigent litigant, expects the Court to provide fundamental fairness on issues of fundamental rights and freedoms which are incorporated in the Constitution.

It is the writer's sincere hope that this thesis will make a significant contribution to the current human rights discourse in the country

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The road to the completion of this study has been long and arduous for two reasons. Firstly, because, at the take-off in 1994 the late Professor Lawrence Shimba who was originally assigned to supervise me had to attend to a more important assignment with the Mwanakatwe Constitutional Review Commission. The Commission sat throughout 1994 and part of 1995. Secondly, pursuing studies at this level while at the same time running an active firm is a very exacting exercise.

A replacement was, however found. During the academic year 1995/96 the University of Zambia School of Law appointed Professor C. Anyangwe as my supervisor. I am greatly indebted to him for his unflinching guidance and direction during my studies. I also wish to thank Dr. Alfred Chanda who assisted Professor Anyangwe in supervising me. I found his comments most rewarding. Dr. Ngosa Simbyakula, former Dean of the School of Law was instrumental in assisting me to narrow the focus of my thesis on the role of the judiciary in the enforcement of human rights. I thank him for that.

This study is dedicated to the memory of my late son, **Masauso Bikoloni Sakala**, LLB. Hons.(London) Advocate of the High Court of Zambia who departed on 14 September, 1994, at the tender age of 29 years. May his soul keep resting in peace.

Acronyms / Abbreviations

ACHPR	-	African Charter on Human and People's Rights.
AFRONET	-	Inter-African Network for Human Rights and Development.
AI	-	Amnesty International.
BSAC	-	British South Africa Company
CAT	-	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
CAP	-	Chapter of the Laws of Zambia
CEDAW	-	Convention on the Elimination of All forms of Discrimination Against Women.
CPC	-	Criminal Procedure Code.
CRC	-	Convention on the Rights of the Child.
ECtHR	-	European Court of Human Rights.
FODEP	-	Foundation for Democratic Process.
ICCPR	-	International Covenant on Civil and Political Rights.

ICESCR	- International Covenant on Economic, Social and Cultural Rights.
ILO	- International Labour Organisation
IRC	- Industrial Relations Court.
LAZ	- Law Association of Zambia.
MMD	- Movement for Multi-party Democracy.
NGOs	- Non-Governmental Organisations
OAU	- Organisation of African Unity
OGDS	- Grand Order of Distinguished Service.
PHRC	- Permanent Human Rights Commission.
PI	- Preliminary Inquiry.
SC	- State Counsel.
SCZ	- Supreme Court of Zambia.
SI	- Statutory Instrument.
UDHR	- Universal Declaration of Human Rights.
UNO	- United Nations Organisation.
UNDP	- United Nations Development Programme

UNIP

- United National Independence Party

UNZA

- University of Zambia.

ZARD

- Zambia Association for Research and
Development.

INTRODUCTION

Human rights in Zambia are not an entirely new phenomenon. The practice of human rights through traditional systems of legal and judicial adjudication have existed in the country from time immemorial. Ethnic groups administered justice through village or chief's courts¹. For example, the Barotse people of the Western Province (formerly Barotseland) had a system of **Kutas** ² for settling disputes which included human rights issues. Under the indigenous justice systems chiefs and their advisers had power over their subjects including the right to life or the right to freedom of movement. Although on the face of it, it may appear to a casual observer that the chief had complete power over his subjects, in reality the life of any subject or the freedom of movement could not be arbitrarily denied or restricted.³

The judiciary in whatever form has, therefore, always played a crucial role in the administration of justice throughout the history of mankind. Zambia has recognised this critical role of the judiciary by establishing an independent and autonomous judicature comprising the Supreme Court, the High Court, the Industrial Relations Court, the Subordinate (Magistrates) Courts, Local Courts and "such

lower courts as may be prescribed by an Act of Parliament." ⁴

Zambia has also recognised the importance of promoting and protecting fundamental rights and freedoms of the individual through an entrenched Bill of Rights.⁵ To ensure such protection as might be necessary, the Constitution provides a mechanism to redress any violation or alleged violation of human rights.⁶ It is, however, provided that to enforce the protective provisions, the aggrieved person must apply to the **High Court** for redress.⁷

This study is about the role of the judiciary in the enforcement of human rights in Zambia. It seeks to examine the part which the judiciary or Courts have and are playing in the enforcement of human rights in the country. It also seeks to examine the extent to which the judiciary is independent of the Executive and the Legislature in the protection of human rights. The study further examines and analyses the provisions of the Bill of Rights in the teeth of numerous **derogations** or **exceptions** therefrom. Are these provisions of merely cosmetic value?

Additionally, the study examines the right of access to justice as a human right. An analysis of human rights litigation in Zambia is focussed on technicalities involved in both civil and criminal litigation, the expenses of hiring lawyers, the procedural technicalities, distances involved especially for rural dwellers and illiteracy. In the final analysis the study examines the role of other institutions involved in the promotion and protection of human rights in the country such as the newly established Permanent Human Rights Commission⁸ and the old Commission for Investigations⁹.

The writer is advocating for the establishment of a Constitutional Court such as the one established in neighbouring South Africa. The increasing awareness and the growing complexity of human rights issues in Zambia necessitates the establishment of such a **specialist** Court having both original and appellate jurisdiction.

The writer is also advocating for human rights litigation to commence at the lowest stratum in the judicial hierarchy. It is argued that it is mythical for the Legislators to provide that aggrieved persons should apply to the High Court only.

for redress of any violation of human rights. Contrary to this positive law approach and contrary to popular concepts, human rights litigation cannot be limited to the High Court alone. Local Courts and Magistrates Courts play a major role in the day to day adjudication over human rights issues.

This study is also strongly advocating for a re-visit of the Bill of Rights which is still an off-shoot of the first generation human rights. In view of the global growth of the concept of human rights, it is imperative that the Zambian Bill of Rights be re-visited in order to bring it in line with international norms or standards.

This study is justified firstly, in that since the return to multi-party politics in 1991, Zambia has experienced an upsurge in human rights awareness among its people especially in urban areas. This is so partly because democracy presupposes that human rights are worth nurturing. The upsurge is also due to a proliferation of Non-Governmental Organisations (NGOs) with a particular focus on human rights issues and the promotion of civic awareness thereto.¹⁰ However, there are still persistent violations of human rights which Courts have been called upon to adjudicate. Secondly,

the few works on human rights in Zambia that exist have either focussed on issues outside the specific role of the judiciary or require extensive up-dating.¹¹ It is hoped that this study will contribute towards a greater understanding of the role of the judiciary in the enforcement of human rights in Zambia. The reader will notice that the theoretical aspects of the study have been, wherever possible, enmeshed with the author's own practical experience of over twenty-four years as an Advocate of both the High Court and the Supreme Court of Zambia. During this period, the author has covered a wide range of both civil and criminal litigation.

Methodology

This study involves a general review of some selected literature on human rights. There is a plethora of literature on human rights ranging from publications of the United Nations and its various human rights instruments; regional human rights literature in America, Europe, and Africa. Relevant materials were collected from a variety of sources such as Parliament, Courts, Tribunals, human rights oriented Non-Governmental Organisations such as the Inter-African Network for Human Rights and Development

(AFRONET): Foundation for Democratic Process (FODEP) and report of Amnesty International.

These reports were fortified by case law where necessary. More importantly, the study benefited the researcher's own experience in the field of human rights and the operations of the judiciary and other stakeholders as a private legal practitioner. Personal interviews were conducted with some judges, magistrates and other judicial personnel. Between October and December, 1997, the researcher participated in a Human Rights Consultancy with the UNDP in Lusaka. This created an opportunity to visit places as far apart as Lundazi in the Eastern Province and Mporokoso and Mbala in the Northern Province in typical rural areas.

Organisation of Study

Chapter One traces the development of human rights in the world. It also examines how human rights have emerged in the arena of national legislation and how the internationalisation of human rights has influenced the application and interpretation of those international norms at the domestic level. The Chapter lays the stage for an indepth inquiry and appraisal of human rights issues in pre-independent Zambia.

In this Study, Chapter two gives an overview of the human rights situation before and during colonial rule. It broadly surveys the human rights situation during these periods by focusing on the role which the indigenous and colonial courts played in the enforcement of human rights, if indeed there were any human rights to talk about in the colonial era. This Chapter sets the background for assessing the role of the judiciary in the enforcement of human rights in the country.

Chapter Three surveys how the International Bill of Rights has inspired many domestic constitution-makers in the world towards respect for human rights as a global concern. The Chapter also examines the meaning of a "Bill of Rights" which has been incorporated in successive Zambian Constitutions since independence. The Chapter further examines the legal framework which provides the mechanism for the protection and promotion of individual rights and freedoms in the country. It concludes by analysing the effect

of derogations or exception clauses which appear endemic in the Zambian Bill of Rights.

Chapter Four deals with the judicial implementation of human rights. The Chapter has adopted, for analysis, five areas of common concern viz: (1) Personal Liberties: (2) Freedom of Expression: (3) Freedom of Assembly and Association and (4) Freedom of Movement. The Chapter examines the role which the judiciary has played in the field of human rights in these areas. It explains that these areas of human rights have been chosen because they appear to be more fertile than others in terms of the frequency of violation or alleged violation. The Chapter examines the difference between a **dualistic** and a **monistic** state in the implementation of international instruments at the domestic level. The former requires domestic legislation to legalise the provisions of such instruments while the latter does not.

Chapter Five analyses the independence of the judiciary. It examines the extent to which the judiciary could be said to be independent of the Executive and the Legislature. The Chapter examines the appointment of judges; their qualifications; their conditions of service their salaries and

perks their security of tenure their privileges and social status. The Chapter then considers the method of disciplining and removing judges from office. The concept of the separation of powers is also examined showing how, at times the Executive or the Legislature has interfered with court decisions.

In Chapter Six, the right of access to justice is examined. The Chapter analyses some aspects of the Zambian judicial system in relation to access to justice in civil as well as criminal matters. By way of comparative approach the Chapter examines the effect on both international and regional treaties relating to access to justice since the country is signatory to some of these treaties, conventions or protocols. The criminal process is extensively discussed in this Chapter because it is in this area of justice where violation of human rights are most frequent. Some impediments to access to justice are also examined such as constitutional derogations especially during states of emergency. Others are the cost of litigation and persistent delays in concluding trials and delivering judgements.

The theme in Chapter Seven is **renvoi**. The Chapter discusses some concluding reflections on what the previous six Chapters have discussed. The primary objective of this Chapter is to examine the role of other agencies or institutions involved in the promotion and protection of human rights in addition to the existing judicial institutions. The creation of a Constitutional Court is also canvassed in this Chapter since fundamental rights are enshrined in the country's Constitution.

The role of the Permanent Human Rights Commission is examined in this Chapter and so are the Commission for Investigations; the Electoral Commission; the Lands Tribunal and the Anti-Corruption Commission since these state institutions play an important role in the area of human rights. Similarly, the role of human rights oriented Non-Governmental Organisations (NGOs) is discussed for they promote human rights awareness by way of monitoring alleged human rights violations.

Chapter Eight contains a brief summary of the study coupled with a similarly brief conclusion which includes suggested areas for future interventions.

End Notes

1. Anyangwe, C., 'The Whittling Away of African Indigenous Legal and Judicial System', **Zambia Law Journal**, Special Edition, 1998 p.60.
2. Mainga, Mutumba., **Bulozi under the Luyana Kings**, Longman, 1973, p.43. See also **An African Survey: A Study of Problems Arising in Africa South of the Sahara**, by Lord Hailey, Oxford University Press, 1957, p. 489.
3. Elias, T.O. **The Nature of African Customary Law**, Manchester University Press, 1956, pp 98-99.
4. **The Constitution of Zambia**, Article 91.
5. Ibid, Part III, Article 11 to 26
6. Ibid, Article 28.
7. Ibid, Article 28(1).
8. Act No. 39 of 1996.

9. Act No. 20 of 1991 (formerly Act No. 3 of 1974)
10. See, for example, the work of Afronet, Fodep, Civic Education Association, Women for Change, the Catholic Mission for Justice and Peace and the Law Association of Zambia (LAZ).
11. See for example, in 1979 Lawrence Zimba (later Professor Lawrence **Shimba**) wrote his Ph.D. Thesis (London University) on **The Constitutional Protection of Fundamental Rights and Freedoms in Zambia** in which he merely examined the legal basis for the protection of fundamental rights and freedoms in Zambia's Constitutional development. In 1984 Muna Ndulo and Kaye Turner wrote on **Civil Liberties Cases in Zambia** which was a mere assembly of various Zambian cases on human rights and fundamental freedoms of the individual. In 1992 Alfred W. Chanda submitted a Thesis to Yale University Law School on **Zambia: A Case Study in Human Rights in**

Commonwealth Africa in which he highlighted how a Bill of Rights has operated in an African country. But this is nearly a decade ago.

CHAPTER ONE

THE DEVELOPMENT OF MODERN HUMAN RIGHTS

INTRODUCTION:

Historically, the protection of human rights emerged in the field of domestic legislation, as for example, the Magna Carta in England, the Bill of Rights in the United States of America and the Declaration of the Rights of Man and the Citizen in France. In those countries domestic human rights legislation was itself the product of popular revolution. In each, the revolutions were themselves influenced by rights theories, such as natural rights and social contract, espoused by a number of philosophers of the time.

The domestic concept of human rights norms was 'globalized' or 'universalised' after the Second World War. The cruelties, oppression and atrocities in the inter-war years in Europe brought the conviction, both during and after the Second World War, that the international recognition and

protection of human rights for all people throughout the world is essential to the maintenance of international peace and security. This realisation led to the adoption by the United Nations of what is now fashionable to term the International Bill of Human Rights.¹

However, because there is nothing like a universal culture and because the various regions of the world are not at the same level in terms of political advancement, economic development, wealth, social cohesion and integration, it soon became apparent that respect and protection of human rights could be additionally ensured through regional human rights arrangements. So, regional specificity has impelled each region of the world such as the Americas, Europe, Africa (and very soon Asia) to adopt regional human rights instruments and mechanisms for the enforcement of the rights enshrined in such instruments.

While this development has gone on at the international level, domestic legislation has not always caught up with the vibrancy of modern human rights discourse.

And so international and regional human rights instruments now influence domestic legislation in two ways: some merely set standards while others impose binding obligations on States parties.

This first Chapter examines the emergence of human rights in the field of domestic legislation, the internationalisation of human rights, and the abiding influence of international human rights norms in the domestic sphere. The importance of this opening Chapter lies in the fact that it sets the background against which the role of the Zambian judiciary in the enforcement of human rights can be critically assessed and analysed because Zambia is a state party to most of the international and regional human rights treaties or instruments.

SECTION 1:

Human Rights Theories

Some rudiments of philosophical discourse on human rights in a broader sense can be traced as far back as the days of Aristotle and through the period of the Stoics of the Greek City of Athens about 300 B.C. However, the modern concept of human rights is rooted in the English, American and French domestic revolutions mentioned above.²

Human rights are those claims which people make or ought to make upon their society by virtue of being human beings. Every human being is endowed with certain inalienable rights by nature. They are universally applicable and are indivisible. They inhere in every person regardless of race, sex, social, political, cultural or economic status.³ To-day this view of the universality and inalienability of human rights in the world is no longer in dispute.⁴

It is, however, noteworthy that although these rights are universally applicable, they are not absolute, nor are they inviolable, neither are they unlimited. Under certain

circumstances they can be restricted or denied⁵ as will be seen in Chapter Four.

A Natural Rights Theory

Early concepts of human rights were based on the theory of natural rights, itself derived from the theory of natural law or the law of nature. The law of nature was thought to be rooted in man as an individual rather than being derived from his civic status. Socrates, a Greek philosopher maintained that individuals should not accept rules which they themselves could not justify ⁶. Natural law theory embodied the principle that all humans share certain common attributes by nature regardless of the social or political constitutions under which they lived.

Another Greek philosopher, Aristotle, joined the philosophical speculation relating to natural law and hence natural rights. He is credited with claiming that it was natural for man to be a member of a polis (a city-state) and by

nature, man required rules to regulate his activities with others in the polis.⁷ However, before Aristotle there was Plato who, after the execution of Socrates, contributed to the debate on natural law. In Plato's view social justice was important if any society was to attain internal harmony within the community as well as among the individual who constituted the community.⁸

In later years and with the decline of the Greek Polis, the concept of a universal system of natural law began to develop. The Stoic philosophers were the first to postulate this concept of the universality of natural law from which natural rights emerged. The Stoics equated man to a citizen of the world in addition to being a citizen of a particular state. They saw man as a rational being capable of devising a universal moral code to ensure that justice prevailed among peoples of the human race. It is said that this concept of a universal code of behaviour guided the Roman legal philosophy of the time in dealing with foreign nations as a result of the influence of the Stoics.⁹

In the 13th Century, St. Thomas Aquinas also philosophised on the concept of natural law and hence natural rights. He regarded natural law as God-given rules. He theorised that the individual needed security of life; a system of order and justice; a morally competent administrative authority acting for and on behalf of the people and the protection of religion under the guidance of the Church.¹⁰

Later, the Renaissance or revival of learning and the Protestant Reformation or religious revolution of the 16th century further stimulated this spirit of philosophical inquiry. The Renaissance postulated on man as an individual under a system of laws which bound both the ruler and the ruled. In this atmosphere natural law or natural rights flourished.¹¹

In the 17th century, John Locke made a lasting impact on the theory of natural law and the enjoyment of natural rights even though he is popularly known for his contribution to the theory of social contract which will be discussed below¹². Locke saw natural law as nothing but reason and that it was rooted in the reasonableness of man. He saw a natural system of government under which the rulers were trustees and the people as beneficiaries. To him all mankind were free, equal and independent. The impact of

his natural law theory penetrated into Europe and into the Americas¹³

It is admitted, however, that this discussion is not meant to be exhaustive because an exhaustive treatment of these early philosophers would require a thesis on its own. That said, the contribution of a number of early philosophers albeit briefly must be recognised.

B. Positivism

The School of Positivism was established in the 19th century by August Comte, a French philosopher. Positivism recognised only facts or laws established through scientific methods and not based on theological or other unscientific methods. Thus, the theory of natural law-cum-natural rights underwent a scathing attack by philosophers from the School of Positivism who argued that a legal system exists only if it can be effectively enforced and that law and morals should be separated.¹⁴

The theory of natural rights *simpliciter* which arose from the concept of natural law was criticised as being negative and therefore meaningless.¹⁵ The positivists argued

that natural law alone could not guarantee human rights unless such guarantees were institutionalised by secular law.

The natural law theory was seen by positivists as anchoring too much on religious or moral platforms. It had no legal backing but the concept of positive rights was linked to legal positivism where laws could be put in place to enforce the enjoyment of human rights. Thus, there appears to be a correlation between positive rights and legal positivism just as there is a linkage between natural law and natural rights.¹⁶

Positivists argue that it was necessary to have some system of legalising moral philosophies on human rights. Such a system would give authority to legislators and enforcement agencies to promote human rights through legal positivism. In short, there is no right where there is no power or authority to secure the object of the right. The point however is that human rights moral activism is a pre-requisite to legal positivism to buttress the enjoyment of human rights. Both natural and positivistic theories of human rights have strengths. Neither of them can operate effectively on its own.¹⁷

C Social Contract Theory

The exponents of the theory of social contract were motivated by the concept of a **covenant**, moral or otherwise, which existed between individuals in a community. Such a covenant could also exist between citizens and their government or their governors. That theory postulated that every person must be willing to abandon his self-preservation instincts in exchange for security of his life, liberty and property. Every person must be willing to limit his free will. ¹⁸

The theory of social contract began in the early days of Plato and Aristotle. Plato formulated the idea of philosopher rulers ¹⁹ who would formulate the true idea of God and the rules of moral behaviour, to regulate economic life, and to control all art and science by its system. ²⁰

Similarly, Aristotle saw the state as omnipotent and therefore all embracing under a powerful but non tyrant monarch who would be accountable to the masses. ²¹ Such a

ruler would fit into Aristotle's theory of a social contract between rulers and their subjects. Later, St. Thomas Aquinas, Thomas Hobbes, and John Locke became some of the leading legal philosophers in the propagation of the concept of social contract. Others were the Dutch Jurist, Hugo Grotius, and the German philosopher, Emmanuel Kant.

All these philosophers had, in one way or another, postulated their theoretical concepts leading to designs of a **Covenant** or **Social Contract**. They were joined in their philosophical designs by French philosophers, Montesquieu and Rousseau, both of whom had important influence on the development of human rights in their country.²²

One eminent English philosopher who is still remembered as a great exponent of the theory of Social Contract is John Locke. But he was also a great exponent of the theory of natural law.²³ Locke postulated a state of nature where men lived as equal but separate individuals. In pursuit of his individual happiness, man entered into a Social Contract to establish order by consent.²⁴

In France, there emerged Jean Jacques Rousseau who postulated equality and brotherhood through the concept of

Social Contract. He emulated John Locke but added the dimension of consent and the General Will to the concept of natural rights. Rousseau's theory of Social Contract gave great inspiration to the French revolutionary leaders of 1789 resulting in the French Declaration of Rights of Man and the Citizen of that year.²⁵

Hugo Grotius, a Dutch jurist who is generally acknowledged as the "Father of International Law" also postulated the theory of Social Contract or "agreement" in the international order²⁶. Grotius argued that it was possible to rationalise the existence of natural rights and that natural laws were not dependent on Deity or God for their validity. It was this secular approach of Grotius which appealed to scholars of the post Renaissance era like John Locke who, as has already been mentioned, advocated the Social Contract theory and the inalienable rights of the individual in society.²⁷ The right to life, liberty and ownership of property could not be abrogated by the state.

In summation, the development of the nature of human rights can be traced to the theory of Social Contract from Plato and Aristotle to John Locke in England and Jean Jacques Rousseau in France. The Social Contract was also the doctrine of

the Roman philosophers who endorsed the right of the masses to elect their magistrates and make them accountable to the people.²⁸ The theory was advocated by those who believed that a person or a group of people would make a contract with the governing authority in return for that governing authority to protect and give service to the masses who put it in power.²⁹ It is analogous to the teaching of the Bible where King David in the Second Book of Samuel is shown to have made a **Covenant** with his people.³⁰

But the concept of Social Contract had many critics. Its enforceability was questioned and its applicability appeared nebulous. One such critic was Thomas Paine who asserted that the English Revolution of 1688 was cradled in contract, and that the American Revolution has the same ancestry. However, in both revolutions the idea of contract could make a claim to have contributed to the cause of liberty.³¹

It can also be argued that the proliferation of written constitutions (with Bills of Rights) in most modern states is a clear contribution of the doctrine of social or political contracts.

Section 2: Early Human Rights Revolutions

The history of human rights is merely a reflection of the various stages of the development of a particular society through its social, political and philosophical beliefs. These rights are often articulated around the ideas which shape and convey them as societal concepts through which domestic legislation is proclaimed and made effective. It has been seen how in Europe and America the Renaissance and the Protestant Reformation stimulated the spirit of philosophical inquiry into natural rights. The law of nature or natural rights taught mankind that human beings were born free, equal and independent. But such freedom, equality and independence were not always easily available. From time immemorial man had to fight against tyrannical regimes in order to enjoy his freedom and equality.

A: The English Civil Liberties

As already stated, popular revolutions contributed to the development of domestic legislation on human rights. These revolutions occurred at varying stages in various

countries but the earliest recorded ones started in England. As far back as A.D. 900 the different tribes of England instituted an assembly of wise men called the 'Witan' which was the precursor of the present two Houses of Parliament. The Witan supported the King but it made its own claims especially under the feudal system. The Witan changed into the Great Council (Magnum Concilium) which later changed into the Houses of Parliament. The Houses of Parliament were divided into the House of Lords, representing the landed gentry and the House of Commons representing the people who elected them.³²

On a number of occasions there were struggles by Parliament against the arbitrary rule of the monarchs, especially the Stuart Monarchs. Although those early struggles were not termed struggles for human rights, they nevertheless possessed the concept of human rights.³³

(i) The Magna Carta (1215)

It is against this background in the English struggle for individual rights and liberties that the Magna Carta of the 13th Century is usually taken as a starting point. However, it

was not until the Bill of Rights of 1689 that a serious attempt was made at formulating the actual rules for the protection of the rights and liberties of the English citizenry.³⁴

The Magna Carta can rightly be described as the Great Charter of English Liberties. It was granted by King John in 1215 under threat of civil war. It was a symbol and battle cry against oppression. It was revised with alterations in 1216, 1217 and 1225 but it was confirmed by subsequent monarchs, usually at the request of Parliament. Magna Carta made provision for ensuring that punishment was proportionate; that justice was not denied or delayed nor sold to anyone. Justice was not to be bought either.³⁵

In so far as human rights and liberties were concerned, the most important provision in the Magna Carta was that contained in Article 39. That Article provided that no freeman was to be taken or imprisoned or deprived of his land or outlawed or in any way destroyed except through the rule of law or the due process of law. The declaration in Article 39 had been in the law books for over 700 years before Magna Carta³⁶ but the rights and liberties were clearly amplified in the Magna Carta.

In terms of property ownership under the feudal system, seignorial courts took great advantage of the Magna Carta. Seignorial justice was regarded in the light of a proprietary right, and hence the courts of feudal lords became the **fons et origo** of the most celebrated clauses of Magna Carta.³⁷

(ii) Petition of Right (1628)

The next instrument of the English civil liberties was the Petition of Right of 1628, drafted and moved in Parliament by Sir Edward Coke, a former Lord Justice turned politician.³⁸ The Petition was the embodiment of the doctrine of the due process of law or the rule of law. It was an attack on the tax impositions of King Charles I which five Knights refused to pay. It was the assertion of the maxim 'no taxation without representation'.

King Charles who ascended to the throne in 1625 imposed taxes by royal command without Parliament's approval. The petition asserted that no person should be

compelled to pay tax or such like charges without authorisation by an Act of Parliament.³⁹ After several evasive actions by the King, the Petition was signed in the form it was approved by Parliament. Thus, a domestic human rights revolution was translated into domestic legislation.

The King's assent to the Petition was received with excitement by Parliament and the public in the streets of London. However, that achievement was the outcome of the struggle between Parliament and the monarch. The Petition itself only served the interests of few landed **Englishmen** and not **women** since women had no voting rights at the time. Although the Petition also emphasized, in clause 10, that no freeman shall be imprisoned or detained without the due process of law,⁴⁰ it did not apply to non-freemen of the day, such as slaves.

(iii) The English Bill of Rights (1689)

The regnal years of the house of Stuarts spanned from 1603 starting with James I and ending with Queen Anne who ascended to the throne in 1702.⁴¹ King James I who ascended to the throne in 1603 was a very unpopular King. He did not like the Protestants. He casually dismissed judges. In 1603 he

ordered seven Bishops to be arrested for seditious libel for which they were eventually acquitted,⁴² forcing the King to run away. His successor, King William was immediately confronted with a Declaration for the Bill of Rights to which he assented.⁴³

The Bill of Rights of 1689 provided that freedom of speech and debate in Parliament was not to be impeached or questioned in any court or place out of Parliament. It provided an insurance policy for members of Parliament against prosecution or impeachment by outsiders. It also provided for free elections of members of Parliament and for freedom of worship. It guaranteed press freedom and prohibited slave trade.⁴⁴

To the ordinary citizen the Bill of Rights was the institutionalisation of the Glorious Revolution of 1688 which forced King James to abdicate the throne. That revolution had established the principle that "rulers could be removed by popular will if they failed to observe the requirements of constitutional legitimacy."⁴⁵

The Bill of Rights protected the citizen against the autocratic rule and oppressive action of the monarch. It also

protected the citizen against excessive fine and excessive conditions for bail. It further protected the individual against cruel or inhuman treatment by rulers. Emphasizing the importance of the Bill of Rights, Lord Denning quotes extensively from historian Macauley's **History of England**. Macauley wrote that although the Declaration "made nothing law which had not been law before, (it) contained the germ of the law" which, inter alia, gave religious freedom, independence of the judge, freedom of the press, prohibition of slavery and reformed the representative system of Parliament.⁴⁶

However, the Bill of Rights like its predecessors, the Magna Carta 1215 and the Petition of Rights 1628 was of little value to the ordinary English citizen. Most of the provisions of the Bill were meant to protect the interests of the more powerful and landed English gentry of the day.⁴⁷ It is noteworthy that the English have now enacted a Human Rights Act, 1998, which incorporates much of the European Convention on human rights into domestic law.

Although a Human Rights Act has been enacted, Britain has no written Constitution enshrining the Bill of Rights. There are many reasons for this. Firstly, the supremacy of

Parliament as opposed to the supremacy of the Constitution, has meant that over the centuries of an unwritten constitution, the ordinary British citizen is content to leave human rights issues mainly in the hands of legislators. Secondly, the majority of ordinary British citizens feel that the liberties and freedoms of the individuals are already sufficiently protected by various enactments of Parliament. Thirdly, most British citizens feel that toleration and commitment to individual liberties and freedoms is the best protection against human rights abuses.⁴⁶

However, it is submitted that the development of modern human rights instruments for the protection of individual rights and freedoms in the jurisdictions of the UN member states, suggests strongly that Britain requires a comprehensive modern Bill of Rights to be incorporated into a written Constitution.

B. American Civil Liberties

The quest for exploration and discovery by some European powers acted as a catalyst for some white emigrants to settle in America. Like the scramble for Africa in later

years, various European nationals streamed to America on political, economic or religious grounds.⁴⁹ The Spaniards were the first to settle in Florida followed by the English in 1607 who settled in Virginia. They comprised religious groups such as the Puritans and Quakers. Dutch settlers later followed English settlers and occupied Pennyslavia.⁵⁰

The domestic human rights revolution of the United States of America in the 18th century emulated the English pattern. People from Great Britain who emigrated to North America in that century took with them memories and experiences of the English Bill of Rights of 1689. They found support and solace in the English concepts of natural rights and the social contract theory.

In his well-known work entitled, 'The Rights of Man', Thomas Paine, a British author who settled in Philadelphia made a profound contribution to the idea of natural rights which influenced American Revolutionary leaders like Thomas Jefferson and Alexander Hamilton. Jefferson drafted the Declaration of American Independence in 1776. Hamilton was among the authors of 'The Federalist' of 1788. Others were James Madison and John Jay, both of Virginia.⁵¹

(i) Struggle for Self-determination.

The experience of the English Glorious Revolution of 1688 and the results of the Bill of Rights of 1689 which followed the Revolution inspired the white settlers in North America to struggle for self-rule. The American white settlers were determined to disengage themselves from British rule, citing high levels of taxation and lack of representation as some of the grounds for demanding self-rule.⁵² In fact the Founding Fathers of America justified their struggle through the natural rights and social contract theories of John Locke, Thomas Paine and other natural law philosophers of the time.

In 1776 the colonists proclaimed themselves free and independent of the British government. The ramifications of that proclamation will be discussed in the next section below.

(ii) The American Declaration of Independence (1776)

The American Declaration of Independence which was drafted by Thomas Jefferson contained substantial elements or concepts based on the English Bill of Rights. Indeed, the Bill

of Rights covered broad principles of the rights of man which inspired the framers of the American Constitution like Thomas Jefferson and James Madison. But the American Declaration of Independence was also a declaration of broad principles of the rights of man. The Declaration was a document which proclaimed the independence of the American colonies from Great Britain based on the principle that all people are created equal and free. These ideas of equality and liberty were seething in Europe at that time.⁵³

On 4th July, 1776, thirteen states mainly from North America unanimously proclaimed the Declaration of Independence at the Continental Congress in Philadelphia. The drafting Committee, however, included Benjamin Franklin, Roger Sherman and Robert Livingston. The aspects of human rights can be found in the preambular paragraph of the Declaration which states as follows:-

“WHEN IN THE COURSE OF HUMAN EVENTS, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the Powers of the earth, the separate and equal station to which Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind require that they should declare the causes which impel them to separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and pursuit of Happiness”⁵⁴

(iii) The American Bill of Rights (1791)

Although the American Constitution was adopted on 17th September, 1787, by the Constitutional Convention, it was not until 1791 that a Bill of Rights was incorporated in the Constitution. Human rights were guaranteed under the first ten amendments to the Constitution. Some of the rights guaranteed under the Constitution were freedom of speech, assembly and freedom of the press. The right to life, liberty

and ownership of property were among the preliminary guarantees in pursuit of happiness under the Constitution.⁵⁵

Initially, the State of Massachusetts could only ratify the Constitution on condition that certain amendments guaranteeing some fundamental individual rights were included. These were freedom of religion, freedom of speech, freedom of the press, freedom of assembly, a militia instead of a permanent army, right of trial by jury and the prohibition of unreasonable searches or arrests.⁵⁶

Most American statesmen of that time felt that the right and freedoms of the individual had to be clearly spelt out and protected. One such statesman was George Mason of the State of Virginia, he refused to sign the document until individual rights were sufficiently protected.⁵⁷ In fact, the Virginia Declaration of Rights was drafted by Mason a month before the Declaration of American Independence.⁵⁸

With these lofty ideas of equality liberty and the pursuit of happiness firmly enshrined in the Constitution of the United States of America, one would have thought that the guarantees would immediately transcend to blacks

and red Indians in the country. In practice, however, the ideals have operated differently.

(iv) The Trans-Atlantic Slave Trade

While equality and freedom became the theoretical rule of the new American hemisphere, the inter-racial relations among the whites, blacks and reds continued to be harsh and sometimes brutal. For blacks, the slave trade across the Atlantic from Africa dehumanised them to the extent that their existence as human beings was often not recognised. Of the American slave, Nathan Glazer writes:

The slave was totally removed from the protection of organised society..... his existence as a human being was given no recognition by any religious or secular agency, he was totally ignorant of and completely cut off from his past, and he was offered absolutely no hope for the future."⁵⁹

The enslavement of red Indians of America was not as successful as that of the blacks. The Indians either died in captivity or escaped. They could not stand working in agricultural plantations as the black slaves could.⁶⁰ The

American Civil war of 1861 - 1865 came to the rescue of slaves in that although it started by way of forcing the Southern secessionists to remain under the Federal system, by an 1862 proclamation all slaves were emancipated.⁶¹

Despite efforts to promote human rights through its constitutional framework, the human rights track record of the United States of America is far from being satisfactory. Slavery, racial discrimination and the genocide committed against Red Indians are issues that continue to haunt America even with its seemingly impressive Bill of Rights.⁶²

C. French Civil Liberties

As already stated above, the theories of natural rights and social contract postulated the principle that every person is born with certain inalienable rights such as the right to life and liberty. Prominent among the French philosophers who contributed to the development of the concept of human rights, as earlier indicated, are Rousseau who threw new light on the theory of the social contract⁶³ and Montesquieu who forcefully formulated the doctrine of separation of powers.⁶⁴ The sovereignty of the nation and the legitimacy of the

government had to be seen to rest in the hands of the people.⁶⁵

The French Revolution (1789)

The French Revolution, like its American precursor, promoted the concept of government of the people, for the people and by the people. Thus, theories of natural rights and social contract of the Lockean dimension were reflected in the Revolution.⁶⁶ Montesquieu's definition of liberty was similar to that of Locke, which emphasised the right of an individual to do anything which the law permitted. The principles of the separation of powers were meant to restrain possible arbitrary rule by the state, thus, advocating the principle of the rule of law.⁶⁷

The main focus of the Revolution, however, was on the abolition of the aristocratic and clerical privileges. It also sought to establish a constitutional government that limited the powers of the monarch in the same way that the Magna Carta limited the powers of King John in England. The sovereignty of the nation and the legitimacy of the government of the day had to be seen to rest in the hands of

the people. Consequently, the Revolution produced the Declaration of the Rights of Man and the Citizen in 1789.

The French Declaration was replicated in the American Bill of Rights. But the first step of the Revolution were the abolition of aristocratic and clerical privileges and the establishment of a constitutional government that limited the powers of the monarch. National sovereignty was a fundamental principle of the Revolution. However, national sovereignty was also based on the principle of democracy and the rights of the citizen.

The state, meaning its representative assembly, would translate the ideals of national sovereignty by regulating the Church, education, worker trade unions, the political and economic life of its citizen while respecting the right of the individual.⁶⁸

Some of the salient features of the Declaration of Rights of Man and the Citizen were - the rights of the individual to due process of the law; the presumption of innocence; freedom to hold religious beliefs and opinion the right to liberty; ownership of property and freedom from oppression.⁶⁹ Article 4 of the Declaration provides that

Liberty consists in being able to do anything that does not harm others: thus the exercise of natural rights of everyman has no bound other than those that ensure to the other members of the society the enjoyment of those same rights. These bounds may be determined only by Law.

These revolutionary ideas were so powerful that most modern written constitutions include provision for the protection of individual rights and freedoms.⁷⁰

Section 3: Internationalisation of Human Rights

The experiences and lessons gained from the effects of the two world wars were traumatic enough to set the international stage for a human rights movement throughout the world. The growth of that movement has gathered such momentum that modern society cannot afford to ignore it. It is now no longer in dispute that every human being is endowed with certain inalienable rights by nature. It is now fashionable for most political and social factions in the world to use the language of human rights.

Before the Second World War the international community paid little attention to the manner in which a state treated its own citizens or people within its borders. But after this human conflagration the international community became concerned about the treatment of the human race in the world.⁷¹ However, it is important to examine, briefly, the earlier international efforts regarding human rights concerns through such bodies as the League of Nations and the International Labour Organisation (ILO).

(A) The League of Nations (1919)

The League of Nations was an international organisation which was established after the First World War, to provide a mechanism for ensuring world peace, international co-operation and security.⁷² It was established mainly as a result of a conference held in Philadelphia in the United States of America in March 1917. It was formally inaugurated in January, 1920.⁷³

The Covenant of the League was its founding document or Constitution. Although the Covenant made no provision for

a Bill of Rights, it made some provision for humanitarian objectives such as humane working conditions and fair and just treatment of colonial natives. It also prohibited trafficking in women and children. For example, Article 22 (1) of the Covenant provided that:

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.

Article 22 (5) provided that:

Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as slave trade, the arms traffic and liquor traffic; and the prevention of the establishment of fortifications or military or naval bases and of military training of the natives for other than police purposes and the defence of the territory.....

Article 23 went on to provide that member states:

- (a) will endeavour to secure and maintain fair and humane conditions of labour for men, women and children, both in their own countries and in all countries which their commercial and industrial relations extend
- (b) undertake to secure just treatment of the native inhabitants of the territories under their control;

- (c) will entrust the League with the general supervision over the execution of agreements with regard to the traffic in women and children, and the traffic in opium and other dangerous drugs

Article 14 of the Covenant established a Permanent Court of International Justice, which was competent to hear and determine any disputes of an international character which state parties wished to submit to the Court.⁷⁴

It is interesting to note that the League used the term Covenant to describe its constitution, a concept which was found in the early theory of social contract. However, despite the paternalistic provisions of the Covenant in respect of the so-called native inhabitants of the colonies, in practice little protection, if any, was accorded to them.

(B) The International Labour Organisation (ILO)

1919

The International Labour Organisation is the oldest specialised agency of the United Nations. It was created by the Treaty of Versailles in 1919 and became an agency of the UN

in 1946. It was created as a result of concerns for social justice and the need for humane treatment of workers throughout the world. It was the beginning of a system to protect social, economic and cultural rights.⁷⁵

In addition to securing and maintaining fair and humane treatment of workers (men, women and children) by member states of the the League of Nations, Article 23 also provided for the establishment of "the necessary international organisations" to implement these ideals. The institution created for such implementation was the International Labour Organisation.⁷⁶

The main objective of the ILO is to promote social justice for working people throughout the world. It formulates international policies and programmes for improving working and living conditions of workers. It also sets out international labour standards as guidelines for domestic application by member states. It also provides technical assistance by way of training, education and research.

The organisation's functions are channelled mainly through **conventions** and **recommendations**. Among the most important conventions from a human rights perspective

are the **Convention on Freedom of Association and Protection of the Right to Organise** (1948), the **Convention on the Right to Organise and Collective Bargaining** (1949), the **Equal Remuneration Convention** (1951), the **Convention for the Abolition of Forced Labour** (1957) and the **Convention on Employment Policy** (1964)⁷⁷

Of the effectiveness of the ILO some authors have commented that:

In discharging the functions for which it was established, the ILO has been a pioneer in the international protection of economic and social rights and has an impressive record of achievement in this field.⁷⁸

Zambia's participation in ILO's Conventions and Recommendations will be discussed in Chapter Three.

(C) The Era of the United Nations 1945

Despite the failure of the League of Nations to forge ahead with its concept of establishing world peace through international co-operation, most of its ideas were incorporated in the Charter of the United Nations. The creation of the United Nations in 1945 was undoubtedly a clear manifestation of the world leaders' continued concern for world peace and security. It was also a manifestation of the international concern for human rights.

The Charter of the United Nations, of which the Statute of the International Court of Justice (ICJ) forms an integral part, was executed by over two hundred delegates on 26th June, 1945 at San Francisco in the USA. It came into force on 24th October, 1945, and 24th October is recognised as United Nations Day.

The preamble to the Charter declares that members of the United Nations are determined to save the world generations from the horrific experiences of the two world wars. Through the Charter of the United Nations, the international community accepted an obligation to establish

guarantees for human rights which would afford protection to individuals, groups or communities whose rights were threatened by government action.⁷⁹

Through the provision of Articles 56 of the UN Charter, all State parties pledge joint or separate action in co-operation with the United Nations Organisation to achieve the purposes enumerated in Article 55 of the Charter. These purposes include the promotion of universal respect for and observance of human rights and fundamental freedoms for all regardless of race, status, sex, language or religion. Article 68 of the Charter empowers the Economic and Social Council to set up Commissions in economic and social fields for the promotion of human rights.

The UN Charter provided for the establishment of:

Conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.....⁸⁰

Thus, one of the main implications of the U.N. Charter was that State parties who became signatories to its treaties would in some cases, *be* legally bound to pass domestic legislation to secure human rights protection or even enforcement. For example, State parties to the Genocide Convention (1948) undertook to enact the necessary legislation to give effect to the provisions of the Convention.⁸¹ Similarly, state parties to the Convention on Racial Discrimination undertook to prohibit racial discrimination by all appropriate means including domestic legislation.⁸²

**(i) The Universal Declaration of Human Rights
(1948)**

The Universal Declaration of Human Rights was proclaimed after the Second World War on 10th December, 1948 by the General Assembly of the United Nations. It sets out in detail an impressive catalogue of common or universal standards for ensuring the protection and promotion of rights and freedoms of the individual in society.⁸³

Article 2 of the Declaration provided that:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Among the rights enunciated under the Declaration are the right to life, liberty and security of person. Others are freedom from slavery, torture, cruel and inhuman treatment or punishment, equality before the law, protection from arbitrary arrest or detention and the right to a fair hearing before an impartial Court or tribunal.⁸⁴ These are primarily civil and political rights.

The Declaration also provides for economic, social and cultural rights. Among them are the right to work, the right to fair remuneration, the right to join trade unions, adequate standards of living, education and the right to participate in the cultural life of one's community.⁸⁵ However, the Declaration provides for duties also. Article 29(1) provides that everyone has duties to his or her community to ensure

full development of one's personality. But the Declaration provides for a derogation where limitations in the enjoyment of these rights can be imposed by law to ensure that other people's rights and freedoms are not in jeopardy. Alternatively, limitations can be imposed by law in the interest of "morality, public order and general welfare in a democratic state" ⁸⁶

The Declaration was not a legally binding document but member states recognised its principles. Even in the absence of an enforcement machinery, it enjoyed wide moral acceptance in international human rights law. It was seen by many states and humanitarian organisations as a beacon toward the formulation and implementation of international human rights standards for domestic application as well.

The current status of the Universal Declaration is that it has acquired a recognisable legal framework through its two International Covenants of 1966 and the First Protocol.⁸⁷ The ratification of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), including the ratification of the First Protocol to the ICCPR by many State

parties to the UDHR, has created a legal basis for the implementation of human rights in many parts of the world.⁸⁸

There is, therefore, no doubt that the influence of the UDHR has been profound throughout the world. It has inspired many constitutional framers. This is evidenced by a proliferation of Bills of Rights in most modern constitutions. Over the years since 1948, the UDHR has acquired a very significant legal status by both international and national standards.

(ii) The International Covenant on Economic, Social and Cultural Rights (1966)

The Universal Declaration of Human Rights formed the basic commitment to human rights by member states of the United Nations. To back-up that commitment two Covenants were later adopted. The first was the International Covenant on Economic, Social and Cultural Rights (ICESCR) which entered into force in January, 1976. The social and cultural rights

mentioned in Articles 23 to 27 of the Declaration are fully amplified in the Covenant.⁸⁹

Of significance under the Economic Covenant is the fact that the obligations assumed by State parties are not of immediate application. Paragraph 1 of Article 2 provides that each State party is to "undertake" to take steps to achieve "progressively" the goals intended to be achieved under the Covenant by all appropriate means, including the adoption of legislative means. Another significant point is that Article 5 paragraph 2 specifically prohibits any derogation by State parties from any fundamental rights existing in their state by virtue of law, not even under a State of emergency.⁹⁰ However, the Covenant permits State parties to discriminate against non-nationals in the enjoyment of economic rights.⁹¹

(iii) The International Covenant on Civil and Political Rights (1966)

This was the second of the international Covenants to back-up the UDHR. It entered into force in March, 1976. The

Covenant amplifies upon the brief provisions of the Universal Declaration of Human Rights concerning civil and political rights. State parties to the Covenant undertake to ensure respect for human rights recognised in the Covenant. State parties also undertake to take necessary steps to adopt legislative or other measures to effect or implement the recognised rights.⁹² An extensive list of the rights under the Covenant is enumerated therein, which list far exceeds the rights contained in the UDHR.⁹³

The obligations assumed by State parties to the Civil and Political Covenant are intended for immediate application unlike the promotional intent under the Economic Covenant.⁹⁴ Article 4 of the Civil and Political Covenant allows for derogations in time of public emergency. Surprisingly, the Covenant does not provide for the right to own property nor protection against arbitrary deprivation of such property.⁹⁵

(iv) The First Optional Protocol to the International Covenant on Civil and Political Rights (1966)

The Covenant on Civil and Political Rights provided for the setting up of a Human Rights Committee to receive and consider communications from individuals who claim to be victims of human rights violations by State parties to the Protocol.⁹⁶ The Protocol entered into force in March, 1976 at the same time as its parent Covenant on Civil and Political Rights.⁹⁷

The First Protocol supplements the International Convention on Civil and Political Rights but mere ratification of the ICCPR does not automatically give any right to an individual to institute a complaint against a State party to the Covenant. The State party concerned must have ratified the Protocol itself.

The Second Optional Protocol to the International Covenant on Civil and Political Rights came into force in July, 1991. The Protocol aims at abolishing the **death penalty**. Once a State ratifies the Protocol then no one shall be executed within its jurisdiction. Zambia has not ratified the

Second Optional Protocol presumably because to do so would require amending the provisions of Article 12 of the Constitution which relates to the protection of the right to life and its derogations.

(v) Other International Conventions

There are several international human rights Conventions or Treaties in operation under the purview of the UN. They deal with specific types of human rights. These instruments represent the translation of human rights from mere declarations into action.

Among the prominent Conventions are the **International Convention on the Elimination of all Forms of Racial Discrimination** (ICEBD) adopted in December, 1965, the **Convention on the Elimination of all Forms of Discrimination Against Women** (CEDAW) adopted in December, 1979, and the **Convention on the Rights of the Child** (CRC) which was adopted in 1989. Others are the **Convention Against Torture and other Cruel,**

Inhuman and Degrading Treatment or Punishment adopted in 1984 and in 1948 the **Convention on the Prevention and Punishment of the Crime of Genocide** was adopted.⁹⁸

Under the aegis of the International Labour Organisation (ILO) some human rights Conventions have been adopted. Among them are the **Convention on the Right to Organise and Collective Bargaining** (1949); the **Convention on Equal Remuneration** (1951) and in 1957 the **Convention on the Abolition of Forced Labour**.⁹⁹

These treaties are now universally accepted as legitimate instruments for the protection and promotion of human rights throughout the world. They are legally binding on member states which have become signatories to them.

It is, again, admitted that this section on treaties is not exhaustive for reasons mentioned at page 8 above.

Section 4: Regionalisation of Human Rights

The principle of encouraging regional settlements of disputes is provided for in Article 52 of the UN Charter. The

Article declares that regional arrangements or agencies for dealing with the matters relating to the maintenance of international peace and security should be encouraged provided such arrangements or agencies are consistent with the purposes and principles of the United Nations.

This principle, which is also found in Article 33 of the Charter, is equally applicable to regional arrangements for the promotion and protection of human rights in the world. Arguments have been advanced, however, depicting demerits of regional systems. The main demerit argument points to the likelihood of diminishing the value of the work of the UN Human Rights Commission and its agencies.¹⁰⁰

However, those who advocated for regional systems for the protection and promotion of human rights seem to have won the day. There are now three major regional systems for human rights in the world, namely, the European, the American and the African systems.¹⁰¹

The advantage of a regional system are that it may easily be understood and, therefore, easily accepted as opposed to universal arrangements with a diversity of cultures. A regional system is also more convenient and less

costly in terms of distance and time for complaints to be processed expeditiously.

Experience shows that regional systems for the protection and promotion of human rights and freedoms are a viable proposition. For example, in Europe, experience has shown that it was possible to conclude a Convention containing binding obligations and setting up a new international machinery at the time when that was not possible to achieve at international fora.¹⁰²

Regional arrangements for human rights protection are mainly prompted by cultural diversities and the desire for setting up a machinery which would resolve disputes or complaints more expeditiously and at less expense than under a universal system.¹⁰³

Although experience has also shown that the two older regional systems of Europe and America are making good progress, there are inherent dangers in regional systems for the protection of human rights. For example, there is the possibility of derogating from international norms of human rights under the pretext of different economic and varying cultures within the region.

There are also dangers of undue delays in attending to complaints due to possible interventions by member states especially the more powerful ones. Furthermore, complaints by individuals against state parties under a regional system are likely to receive less attention than under the international system. For the African Region, this is a real danger because of what is commonly referred to as the application of double standards.^{103a}

A. The European Region

The post Second World War concerns about human rights which led the UN to adopt the Universal Declaration of Human Rights had similar effects in the European Region. There was also the fear of the spread of **communism**. Thus, the Congress of Europe which met at The Hague in May 1948 declared its desire for a United Europe with a Charter of Human Rights and a Court of Justice with adequate powers for the implementation of the provisions of the Charter.¹⁰⁴ Since then the European regional human rights system has forged ahead considerably. Even Great Britain which does not have a

Bill of Rights in the modern sense has ratified the Regional Convention on Human Rights.

(i) The European Convention on Human Rights (1950)

The European Convention on Human Rights (ECHR) was signed by member states in Rome in November 1950. The Convention was drafted under the auspices of the Council of Europe, an inter-governmental organisation comprising, at first ten European States. Although the Convention was adopted in 1950 it only entered into force three years later in September, 1953.¹⁰⁵

The Convention is the oldest instrument specifically designed to protect and promote human rights in Europe. It pre-dates the UN International Covenant on Civil and Political Rights which was adopted in 1966 but which, as already stated, only came into force in 1976.

The obligations of State parties to the Convention require member States to guarantee to everyone within their

jurisdiction the rights and freedom of the individual as defined in the Convention.¹⁰⁶

Originally any person within its jurisdiction had a right to petition the European Commission of Human Rights and a right to the consequent jurisdiction of the European Court of Human Rights.¹⁰⁷ The Commission has now been abolished leaving the Court as the only organ to ensure that the European human rights system matures into an effective arrangement.

(ii) The European Social Charter (1961)

The European Social Charter (ESC) was adopted by the Council of Europe in October, 1961 and became effective in February, 1965. It focuses on economic and social rights in the European region. Member States must recognise and accept the international principles of the rule of law in respect of the protection and promotion of human rights in their jurisdiction.

Contracting parties undertake to bind themselves that the rights enumerated in Articles 1 to 9 of the Charter are effectively realised or implemented. Among these rights are the right to work, the right to just conditions of work, the

right to safe conditions of work, the right to a fair remuneration and the right to organise. Others are the right of children and young persons to protection, the right to social and medical assistance and the right to migrant workers and their families to protection and assistance.¹⁰⁸

The salient features of the Charter are that, it is divided into five parts. Part I contains nineteen rights which contracting parties declare as aims and objectives. Part II contains rights to which contracting parties are legally bound. Part III contains undertakings relating to matters contained in Parts I and II. Part IV contains the mode of reporting to the Council of Europe which contracting parties are obliged to make. Part V contains derogations permitted in time of war or public emergency.¹⁰⁹

(iii) **European Protocols**

Originally, the European Convention had selected areas for ratification on human rights in the region. However, through the use of **Protocols**, additional rights have been included. For human rights activists, the **Sixth Protocol** which entered into force in March, 1985 was of special interest. It was the Protocol which abolished the **death**

penalty in the jurisdiction of member States. It is noteworthy that the UN **Second Protocol** to the Civil and Political Covenant which abolished the death penalty was only adopted in 1990.

It will be observed that the European system had made use of Protocols to supplement, incrementally, the provisions of the principal instrument for human rights. This is so because contracting parties have recognised that in all jurisdictions of member states, domestic legislation is a continuing process.¹¹⁰ Again, and without doubt, the European human rights system is a success even though there is still room for improvement.

B. The American Region

As far back as the 1820's, the Latin American states realised the importance of promoting economic development and peaceful settlement of disputes in the region. Latin American States and the United States of America held regular meetings before and during the First and Second World Wars.¹¹¹

**(i) The Organisation of American States
Charter (OAS) (1948)**

The Charter of the Organisation of the American States was adopted at Bogota in 1948. It became popularly known as the Charter of Bogota. Under the Charter, member States recognised that the grouping was a regional agency as defined by United Nations principles.

The organisation's main objective was to strengthen peace and security in the region. But it also aimed at promoting economic and social development which covered human rights concerns. The Bogota Charter, however, adopted the American Declaration on the Rights of Man of the same year.¹¹²

**(ii) The American Convention on Human Rights
(1969)**

The Convention was adopted at San Jose in Costa Rica. The State parties to the Convention undertook to respect the

rights and freedoms of all persons in their jurisdiction. The Convention's catalogue of rights and freedoms follows very closely that found in the Universal Declaration of Human Rights.¹¹³

The Rights covered include the right to life, the right to humane treatment; the right to personal liberty; freedom from slavery; the right to freedom of speech and assembly; and the right to fair trial.

Chapter VII of the Convention creates an Inter-American Commission of Human Rights while Chapter VIII establishes an Inter-American Court of Human Rights. Only member States and the Commission have the right to submit a case to the Court, not individual applicants. This ouster clause against individual petitioners also applies to the European Court of Human Rights.¹¹⁴

The American regional arrangements have also shown that the promotion and protection of human rights can be effective. This, of course, is conditional upon member States being prepared and committed to subject themselves to a regional jurisdiction or control by regional agencies. So far,

State parties in the region have signalled their determination to make their system functional.

C. The African Region

Not to be outdone, the African Region through the Organisation of African Unity (OAU), embarked upon a series of meetings aimed at establishing an African Human Rights Charter.

(i) The Organisation of African Unity (OAU) (1963)

The Organisation of African Unity was established as a regional inter-governmental organisation. Its membership is open to governments on the continent which subscribe to the ideals of the Organisation and its agencies. Island governments surrounding the continent are also eligible for membership.

The Organisation was established when its Charter was adopted in Addis Ababa, Ethiopia on 25th May, 1963. Of

particular significance is the fact that 25th May is observed by member States as Africa Freedom Day.¹¹⁵

Among the five specific purposes of the OAU was the promotion of international co-operation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights. Pursuant to this principle the OAU established the African Charter on Human and People's Rights.

(ii) The African Charter on Human and People's Rights (1981)

When compared to the European and American regional systems, the African system for the protection and promotion of human rights is relatively new. The African Human Rights Charter was sometimes referred to as the Banjul Charter where it was drafted. The Charter binds State parties to it. The signatories to the Charter become legally bound and obliged to protect and promote the rights and duties therein specified.

The African Charter on Human and People's Rights has certain distinctive features from its European and American counter parts. For example, it reflects the African concept of human rights in that it recognises and reflects African culture and African legal philosophies. It highlights the importance of the community in accordance with African traditions. It provides for certain duties to be performed by individuals in favour of the State such as the need to maintain the security of the State.

The Charter is divided into two Parts. Part I contains rights and duties. Member States undertake to adopt legislative and other measures to give effect to the rights, duties and freedoms which are enshrined in the Charter.¹¹⁶ Part II contains measures of safe-guarding and implementing human and people's rights by establishing a Commission.¹¹⁷

In contrast with the European and American Conventions, the African Charter contains civil and political rights as well as economic, social and cultural rights. Secondly, it provides for individual as well as collective rights under the emblem of "people's rights".¹¹⁸

Above all, the Charter maintains its recognition of the international human rights norms which are reflected in the Universal Declaration of Human Rights. It has not derogated from international human rights principles. In line with the two regions discussed above, the Charter created the African Commission on Human and People's Rights.

(iii) The African Commission

The African Commission on Human and People's Rights was established in July, 1987 under the provisions of Part II of the Charter. It was mandated to promote human and people's rights and in particular:

- (a) to collect documents, undertake studies and researches on African problems in the field of human and people's rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and people's rights and, should the case arise, give its views or make recommendations to Governments.¹¹⁹

The Commissioners are nominated by State parties to the Charter and are holders of high offices in their respective governments, particular preference being given to persons having legal experience.¹²⁰ Each State party to the Charter can nominate up to two candidates. The Commissioners are elected by secret ballot by the Assembly of Heads of State and Government to serve terms of six years. Not more than one national of the same member state shall be members of the Commission. Once elected, members of the Commission serve in their personal capacity.¹²¹

The Commission is composed of 11 members "chosen from amongst African personalities of the highest reputation known for their high morality, integrity and competence in matters of human and people's rights."¹²² Its Headquarters are located in Banjul, the Gambia.

Proceedings of the Commission are subject to scrutiny of the Assembly of Heads of State and Government.¹²³ The procedure whereby the Commission's Annual Reports and other recommendations are not published until the OAU ratifies them results in what former President Julius Nyerere once described as the "solidarity of silence" on the mischief of a member state.¹²⁴

(iv) The African Court on Human and People's Rights

Since the establishment of the African Commission on Human and People's Rights, member States of the African Charter have pondered upon the need to create an African Court on Human and People's Rights to enhance the protection of human and people's rights in the region.

Article 66 of the African Charter provides that special **protocols** or agreements may be adopted by member states to supplement the provisions of the Charter. Consequently, in 1998 member states of the OAU adopted a Protocol to the African Charter on the establishment of an African Court. The Court is intended to supplement the protective mandate of the Commission. Its jurisdiction extends to all cases and disputes submitted to it regarding the interpretation and application of the relevant provisions of the Charter.¹²⁵

The Protocol provides that the Court shall comprise of eleven judges who must be nationals of member states but who shall be elected in their individual capacities. No two judges can be elected from the same member state.¹²⁶

It is yet to be seen how effective the African Court will be in the enforcement of human and people's rights in the African region. Access to the Court is available to member states as well as aggrieved individuals and Non-Governmental organisations with OAU observer status.¹²⁷

Conclusion

At the international level more than fifty international instruments on human rights and freedoms of the individual have been adopted by the United Nations over the past fifty years.¹²⁸

There is no doubt that the Universal Declaration of Human Rights has given a universal value to the concept of human rights and individual freedoms throughout the world. However, the development of domestic human rights legislation has often lagged behind the international trend. This is more so in **dualist** legal systems where any treaty obligations are not automatically translated into domestic legislation as is the case in **monist** legal systems.¹²⁹

People of all regions of the world are now prompted by the universal desire to live in peace and to observe respect for human rights and fundamental freedoms. Regional human rights systems of protecting and promoting respect for human and people's rights are growing stronger from decade to decade.

Against this background, the next Chapter will examine the human rights situation in Zambia, formerly Northern Rhodesia, before and after colonial rule.

Chapter One

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CHAPTER TWO

AN OVERVIEW OF THE HUMAN RIGHTS SITUATION IN ZAMBIA BEFORE AND DURING COLONIAL RULE

INTRODUCTION

It is now common learning that pre-colonial Africa had a coherent system of human rights, although the philosophy underlying that system differed from that which inspired the pattern of human rights in Europe and North America.¹ The notion of human rights was an integral part of the legal traditions of Africa. Despite the great variety in which traditional societies functioned, customary laws shared certain fundamental principles and features of universal truths, values of morality and reasonableness.²

Certain rights, practices and customs in traditional Africa reflect long-standing support of the practice of human rights. These included the right to life, freedom of expression, religion, association and movement, the right to receive justice,

the right to participate in the process of decision making, the right to work and the right to general education. Take the Dinkas of South Sudan, for example. A study of Dinka tradition suggests that they clearly had notions of human rights that formed an integral part of their value system which promoted a sense of human dignity.³

As earlier stated, the concept of human rights is not something that is new to Africa, introduced there during the colonial period. In fact, in terms of contemporary notions of human rights, colonialism was itself the very negation of human rights. It led to the domination, oppression and exploitation of a people by another. It arrested development of nation-states. It brought into being countries with artificially drawn boundaries, now a major source of conflict and tension on the continent. Colonialism amounted to a denial of self-determination. It denied colonial subjects civil and political rights which were enjoyed in the colonising states.

However, colonialism did produce some beneficial effects. For example, it out-lawed slavery, child marriages and forced marriages. It abolished vicarious criminal liability. It criminalised torture and other cruel, inhuman and degrading

treatment such as trial by ordeal and also sorcery or witchcraft.

This Chapter focuses on two periods, pre-colonial and colonial. It surveys in the broadest outline, the human rights situations in pre-colonial and colonial Zambia, paying close attention to the role played by indigenous and colonial courts in the enforcement of such human rights as were then recognised. The importance of this historical background lies in the fact that it sets the stage for subsequent indepth inquiry into, and appraisal of, the role of the judiciary in the enforcement of human rights in independent Zambia.

Indeed, mere recognition, without implementation, of human rights is not enough. The justiciability of human rights is, therefore, critical as far as implementation goes. Hence, the signalled role of the Court in the enforcement of human rights. For, in the final analysis human rights is all about justice and the respect for human worth and dignity.

Section 1: The Pre-Colonial Era

Despite there being no written records on pre-colonial Zambia', archeological evidence suggests that during the period between the eleventh and fifteenth centuries, a fairly organised social and political system had existed along the Zambezi river.⁴ Some indication of the indigenous legal and judicial system will first be given. Thereafter, the practice of human rights in traditional Zambia will be examined.

A. Indigenous Legal and Judicial Systems

Even in a primitive society some form of rules or regulations exist to control behaviour or to maintain peace and order. Usually, in such societies the rules or regulations are unwritten. They are, however, passed on from generation to generation and could be referred to as social codes of behaviour.⁵

Before colonisation, the various tribes comprised in what is to-day known as Zambia, had their own justice systems for dispute resolution and for maintaining peace and order among themselves. These justice systems varied from

one indigenous group to another but they shared certain fundamental features in their organisation. All indigenous groups had village 'headmen', chiefs and Paramount Chiefs.⁶

It was through this hierarchical set up that the indigenous judicial systems operated. For in these systems there was no separation of powers in Dicey's sense of the term. The Chief-in-Council was also the judge. However, in all trials great weight was always placed on discovering the truth. The emphasis was on finding justice rather than engaging in narrow fact-finding and law-finding exercise.⁷

Procedures in indigenous judicial systems were simple and informal. In dealing with cases, judges focussed on finding a solution to a dispute, which would be acceptable to the parties and to the community as well. The quest for acting humanely and fairly was, therefore, always present in traditional judicial systems whether the case was civil or criminal.

B. Human Rights in Traditional Zambia

In most traditional systems in pre-colonial Zambia, the concept of human rights was closely linked to some spiritual beliefs. It was connected to the fear of supernatural consequences for breaking any traditional taboo. Thus, through the observance of various taboos, the right to receive justice, the right to participation, freedom of association, expression, religion and movement were all protected and promoted. But those practices varied according to the subject matter and the social situation of the time.

There were taboos affecting an individual or a family or the general well-being of the entire community. Punishment for their breach or violation was meted out according to the category of the offence.⁸ The offences, procedures and punishments were developed in such a way as to be responsive to prevailing local cultures. Those local cultures took into account traditional ideas of penology.

(i) **Right to Life:**

Life among indigenous Zambians was highly valued and, like many other African societies, it was protected by a retributive / deterrent system of punishment against the wrong doer. A person who killed another or committed a heinous offence was looked upon as being possessed by the devil or simply as the devil himself. Thus, one who killed was also killed but usually the practice was to compensate the injured party or family. There were no prisons although a murderer or madman could be confined or locked-up in a hut until relatives produced adequate compensation.⁹ It was, however, justifiable to kill in self-defence or under severe provocation such as killing an adulterer.

However the right to life was also linked to some beliefs or superstitions. Children born with upper teeth, known as **icinkula** in Bemba, were killed. And when one twin died immediately after birth, the surviving twin would be thrown into a river. Such children were regarded as evil omens. It was believed that the child was mysterious and, therefore, unwelcome. Similar superstitions, obtained among the Tswanas in justifying infanticide.¹⁰

(ii) Right to Justice and Fair Trial

Justice among the indigenous Zambians was dispensed through the hierachical model of the village headman, the chief and the Paramount Chief. The village headman or headwoman presided over and settled community and family disputes. Above the village headman was the Chief whose jurisdiction covered a larger area than that of the village headman. Similary, the Paramount Chief's jurisdiction covered a much larger area than that of the ordinary Chief. In fact, a Paramount Chief's jurisdiction covered areas of a number of Chiefs under him or her.

For example, by the time the colonialists arrived in Zambia, the **Kuta** system of the Barotse in what is now known as the Western Province, the Chilolo system among the Bembas and similar systems among the Ngonis and Tonga had reached a fairly elaborate stage.¹¹ Through these Kutas or Councils, the notion of justice and fair play was transmitted throughout the hearing of any dispute. It was the duty of the Chief or village headman to ensure that life in his area, whether individually or collectively, went smoothy.¹²

(iii) Criminal Justice System

Some indication of the criminal justice system in pre-colonial Zambia has been dealt with above when considering the right to life. However, in other criminal matters, traditional attitudes toward penology were focussed on retribution as well as deterrence. Retribution is vengeance. It is tit for tat. The concept of deterrence was to stop people from committing heinous crimes such as murder, sorcery, witchcraft, rape or theft. A convicted thief had one of his hands chopped off so that he could always be identified as a thief. His eyes could also be plucked out so that he could no longer see the temptations around him.

In contemporary human rights practices these remedies may appear barbaric as being cruel, inhuman and degrading treatment. But in traditional primary units such as villages where every body knew each other, the remedies were quite effective¹³.

(iv) The Right to Education:

The indigenous traditions of pre-colonial Zambia recognised the right of a new born child to be nurtured and educated through the social fabric of its community. Through initiation ceremonies such as **cisungu**, girls were taught what it meant to mature into adulthood, how to honour or respect their parents, their elders in the village and how to be good housewives. In a similar manner boys were initiated to manhood through initiation ceremonies. Initiation rites might have differed from tribe to tribe but the purpose was generally the same. It was to educate the boy and the girl into adulthood.¹⁴

(v) Freedom of Expression and Association:

The traditional system of government was based on popular discussion and consensus. The system of Councils and Chief's Advisors or **Chilolo's** was designed to define the important role of the governed vis-à-vis their governors. All

the villagers were represented by their family head at the **indaba** (Ngoni), **Insaka** (Bemba) or the **Kuta** of the Barotse. All the tribes of Zambia had a similar system of free expression and association.¹⁵

(vi) Land Rights

The dominant conception of land as a human right among the indigenous Zambians was that it was a communal and not an individual right. Under traditional land rights, a family could claim an undisturbed tenure of a piece of land for as long as it needed it. When it was no longer required, the land reverted back to the community and could be apportioned to others. With regard to land, the Chief's role was to ensure that each family had enough land to cultivate.¹⁶

(vii) Rights of Women and Children

Generally, the indigenous Zambian communities practised social distinction based on sex and age. The position of a woman was one of being protected either by the family or by the husband. But such protection did not necessarily mean subservience. Such social status could, in fact, be

Section 2: The Colonial Period

An appraisal of the legal and judicial system during colonial rule in Zambia will now be made. The colonial human rights record will be examined.

Although the British explorers had been active on the African continent for some time it was only after the Berlin Conference in 1884-85 that Great Britain became seriously involved in the acquisition of Protectorates and Colonies in Africa. Before that, the British remained mainly passive in their participation in the annexation of the continent. British activity in the colonisation of some parts of Africa was largely the work of Lord Salisbury who was British Prime Minister between 1885 and 1892.¹⁹

The acquisition of colonial territories was often done through Chartered Companies. By 1890 Charters had been granted to a number of trading companies in Africa and elsewhere. In India it was done through the British East India Company while in Canada the Charter was granted to the Hudson's Bay Company. Similar trading companies were

formed in the Gold Coast (Ghana) and Nigeria through which the British colonial empire was eventually established.²⁰

In 1889 the British South Africa Company (BSAC) was granted a Royal Charter which enabled it to administer Southern Rhodesia (now Zimbabwe) and Bechuanaland (now Botswana). In the same year the BSA Company extended its administration to Northern Rhodesia, which at that time was made up of two territorial parts, namely North-Eastern and North Western Rhodesia. The Kafue River was the boundary between the two territories.²¹ In August 1911 the two territories were officially unified and placed under the control of the British High Commissioner in South Africa.

The British South Africa Company, however, continued to administer the unified territories until 1924 with Barotseland occupying a special status following an agreement signed between the Barotse and the BSA Company in 1900. The main policy in terms of administration was direct rule but Chiefs were used as agents of government. Their authority and privileges were upheld as long as these were not incompatible with the rule of the Company.

In 1918 an Advisory Council consisting of five elected white settlers was formed to assist the territory's BSA Company's Administrator. In 1924 an Executive and Legislative Council were placed under the direct administration of the Government at Westminster.²² The indigenous people had no role to play in the structure and functions of that framework.

With the introduction of colonial rule in Zambia a new legal and judicial system was established basically for the benefit of the white settlers.

A. The Legal and Judicial Dualism

It has already been stated that before the advent of white settlers into Zambia, the traditional judicial systems were those of various indigenous groupings called tribes. But although varied, the systems shared certain common features of simplicity and informality in their procedures. These systems were all based on customary or traditional law. Their greatest weakness was that there were no written records.

Although the British imported their law into the colonial territory, they nevertheless recognised the indigenous law subject to certain qualifications. Indigenous law governed the indigenous people and did not apply to the white settlers.²³

The administration of justice in Northern Rhodesia consisted of Native Courts, Subordinate or Magistrate Courts, the High Court and the Court of Appeal in that order of ascendancy. Their respective jurisdiction was subject to varying limitations but they all had both civil and criminal jurisdiction. But no case involving a person of European or Asian origin could be tried in a Native Court.

The early Native Courts were manned by Chiefs. They were supervised by colonial officers who were called Provincial or District Commissioners or District Officers. Native Courts were initially concerned with Africans in rural areas. In 1938, however, the urban Native Courts were established due to the growth of urban native communities²⁴ and by 1956 there were thirteen such Courts throughout Northern Rhodesia.²⁵

The Barotse Native Courts had their own established judicial system. The system consisted of the **Kuta** which comprised of office-bearers known as **Indunas** and members of the Royal Family. In the early days no provision was made for the supervision of the proceedings of the Barotse Courts and there was no right of appeal from them. ²⁶

Subordinate or Magistrate Court had had exclusive jurisdiction over white settlers. The officers who manned those Courts were not trained lawyers but basically administrators. They were primarily concerned with the maintenance of law and order in their respective areas. Yet they had supervisory jurisdiction over Native Courts. That role was, however, rarely exercised in the early days of the BSA Company's administration because the indigenous courts were restricted to their own tribal areas. Similarly, the appellate jurisdiction of the Subordinate court was rarely exercised. ²⁷

Both the North-Western (Rhodesia) Order-in-Council of 1899 and the North-Eastern (Rhodesia) Order-in-Council of 1900 introduced more detailed system of judicial administration in the two territories. Magistrates were appointed and Magistrate Courts were established. However, the British South Africa Company continued to nominate candidates for the

Magistracy while the actual appointments were made by the High Commissioner. When the two territories were amalgamated the two magisterial structures were also merged. The procedures and practices of the Courts were standardised.²⁸

As for the High Court, it was established in 1900 with civil and criminal jurisdiction. It had both original and appellate jurisdiction.

The appointments were made mainly from the ranks of practising lawyers or judges of other British Colonial territories. Judges could be transferred from one British colony to another. The main qualifications of such judges were that they should have been judges of a court with unlimited original jurisdiction or that they should have been practising advocates of not less than ten years standing.²⁹

Appeals from the High Court of Northern Rhodesia lay to the joint Appeal Court of Northern and Southern Rhodesia. During the period of the Federation of Rhodesia and Nyasaland (1953-1963) the Appeal Court was named the Supreme Court of Rhodesia and Nyasaland.³⁰ It became the

appellate Court of the three Federal Territories. Appeals from the Federal Supreme Court lay to the Privy Council in Britain.

At independence the Northern Rhodesia Order-in-Council of 1963 established the Northern Rhodesia Appeal Court. Appeals from that Court lay to the Privy Council despite Zambia being an independent Republic within the British Commonwealth. In 1973 the Appeal Court was re-named the Supreme Court for Zambia and it became the final Court of Appeal in the second Republic.

B. Colonial Rule and Human Rights

As stated earlier, colonialism was itself a negation of peoples' rights. It led to the denial of fundamental rights and freedoms to the colonised. Additionally, the advent of the slave trade in Africa greatly contributed to the erosion of human rights on the continent. The work of the explorers, missionaries and foreign traders made colonisation of Northern Rhodesia a natural concomitant of the colonisers' exploitative pursuits. It is against this backdrop that human rights under colonial rule in Northern Rhodesia must be examined.

It has already been shown above that the first thing the colonial rulers did upon occupying Northern Rhodesia was to introduce a dual legal system. This meant that there were separate laws in operation for the indigenous people on the one hand and for the European settlers on the other. In order to have a bird's eye-view of the state of human rights in colonial days, it is important to examine a few examples.

(i) Right to participate in Government

The Constitutional framework during the days of colonial rule did not allow the participation of Africans in the legislative machinery of the country. Despite their numerical superiority, native Africans were lamentably underrepresented. Their interests were seemingly represented by a white settler nominated by the Governor under the provisions of the Northern Rhodesia Order-in-Council.³¹ There were no political parties in the country. Africans were denied this basic human right. The franchise was restricted to British subjects while Africans were classified as "protected persons" who could not qualify to vote under the then existing political system.³²

(ii) Discrimination on Grounds of Race

Much of the political history of Zambia is in fact an account of the struggle between the white minority and the black majority with the former anxious to preserve their privileged position and the latter anxious to assert their right to self-determination.

Under colonial rule the infringement of human rights of the native African covered every walk of life. There were special provisions for employment of Africans under the Employment of Natives Ordinance. A "native" was defined as:-

any member of the aboriginal tribes or races of Africa or any person having the blood of such tribes or races and living among and after the manner of natives.³³

Thus, there were separate salary scales for Africans, coloureds (mixed blood) and whites. The wages received by Africans were "pitiably small" compared with wages for whites.³⁴ These categories lived in separate residential areas although the Employment of Natives Ordinance permitted "servants" to be housed on land occupied by the employer.³⁵ Under the Ordinance "servant" did not include a "native policeman, a messenger or a member of the Unified African

Teaching Service."³⁶ These and other African employees were housed in separate residential areas. For example, in Ndola the white settlers lived in the City Centre, Northrise and eventually Itawa Suburbs. Coloureds lived in Hillcrest and Indians in Kanini Area or on top of their shops or in the vicinity of those shops in the second class trading area, mostly in the Chisokone Avenue area. Africans lived in places like Kabushi, Masala and Chifubu, away from the City Centre.

Freedom of movement as basic human right was also denied to Africans. They were required to carry a document known a **Chitupa** for identification purposes. Europeans were not required to do so. Rural Africans could not move freely into urban areas. From 1927 permits were necessary for Africans wishing to visit, reside or work in towns along the line of rail. And no one could move freely at night without a special permit.³⁷ For example, the entrance or presence of a person in a mine township without a permit was a criminal offence under the Employment of Natives Ordinance.³⁸

Various reasons were given by District Commissioners for denying Africans the freedom of movement. These ranged from controlling noisy Africans to reducing the number of

Africans roaming European towns. But it was racial discrimination of the highest form.

Those Africans who lived in houses in municipalities were not permitted to receive visitors without the prior permission of the Location Superintendent who was popularly known as **Changachanga**.³⁹ The Employment of Natives Ordinance, was the legal instrument used to suppress the freedom of movement of the Africans.⁴⁰ Desertion by an African from the service of his European employer was criminalised by section 75 (4) of the Employment of Natives Ordinance.⁴¹

Other facilities such as schools, hospitals and playing fields were also racially segregated. The standards of white schools and hospitals were often superior to those used by Africans. Socially, white men could take black women as concubines and occasionally as wives. They could even have children with black women but it was almost a treasonable offence for an African man to be in love with a white woman. African men usually expressed grave concern over the behaviour of some white men who were committing adultery with black women but went unpunished.⁴²

Education for Africans was limited to primary school level. Until 1925, the Barotse National School was the only institution for Africans under the administration of the British South Africa Company.⁴³ Efforts by the colonial government to increase education opportunities for Africans before independence in 1964 were negligible. However, efforts to increase efficiency of primary schools were fairly credible.⁴⁴

Nevertheless, the entire educational system under colonial rule was discriminatory on the basis of race or colour. Despite their quest for education and professional training, many avenues remained closed to Africans. In fact, African education was hopelessly backward until Zambia achieved independence in 1964. The number of ^{not} ~~Zambian~~ University graduates at indepen^{ce}ce time was about one hundred only.⁴⁵

(iii) Land Rights

The problem of land rights in Northern Rhodesia was accentuated by the arrival of the white missionaries, traders, explorers and concession-seekers. The basic concept of Africans in the territory was that land was a communal asset. It was not easy for white settlers from the industrialised

Countries of the world to realise the significance of land in the eyes of most Africans. The concept of communal land was all pervading and made the indigenous people exceptionally sensitive over land issues.⁴⁶

When the British South Africa Company (BSA) was relieved by Great Britain of the administration of Northern Rhodesia in April, 1924, it was provided that the BSA Company should also assign and transfer:

to the crown all such right and interest in lands as it claimed to have acquired by virtue of the concessions granted by Lewanika... throughout North-Western Rhodesia as well as elsewhere in Northern Rhodesia.⁴⁷

Crown lands meant all lands and rights or interests in any lands in Northern Rhodesia other than freehold lands vested in the BSA Company or land granted in perpetuity to any person by the Governor, Barotseland, other Native Reserves and Native Trust Land.⁴⁸ The Crown Land and Native Reserve Order-in-Council of 1928 were supplemented by the Native Trust Land Orders-in-Council of 1947 to 1964. Native Trust land, like Native Reserve, was set aside for the sole

use and benefit of the natives of Northern Rhodesia.⁴⁹ Thus, the land in Native Reserves and Trust Land fell under customary land tenure, being administered according to customary land law. In most cases customary land can be transferred **inter vivo** or by inheritance with communal rights of grazing or drawing water.⁵⁰

Despite the protective provisions made by Great Britain, when white settlers arrived, they either 'purchased' land from chief, or obtained it through concessions as in Barotseland. sometime, they took it by force under the juristic doctrine of the right of **eminent domain** which entitles every government to the ownership of 'unoccupied' land. This, in most cases, deprived the indigenous people of their customary right to land. In the majority of cases, the white settlers went for the most fertile land and the best climatic places. The best pieces of land along the line of rail was reserved for occupation by white settlers. As a result, land from Mkushi through Kabwe to Choma became occupied mainly by white farmers. This stretch of land was usually referred to as the maize belt due to its high yield of maize.

(iv) Political Rights

Colonisation also played a vital role in the political subjugation of the indigenous people. It promoted and protected racial discrimination against Africans. It impeded the right to self-determination of the indigenous people. Violation of political and other rights was commonplace. Africans throughout the protectorate of Northern Rhodesia often reacted with hostility as a response to the glaring manifestations of cruelty, unabated deprivation and racial discrimination under colonial rule.⁵¹ It was indeed colonial oppression that stirred up nationalism.

Initially, however, Africans resorted to formation of seemingly innocent organisations known as **Welfare Associations**. In fact those Associations were virtually political organisations. The first one to be formed was at Mwenzo Mission in 1923 in present-day Isoka District of the Northern Province. That was just a year before the British Crown took over the administration of the territory from the British South Africa Company. In the 1930s and 1940s Welfare Associations spread to Livingstone, Lusaka, and the Copperbelt.

The rapid spread of these Welfare Associations was a threat to the colonial administration. The thrust of the Associations was obviously political emancipation of the indigenous people. It was, therefore, not surprising that the colonial administrators enacted legislation to control and regulate assemblies or processions in the territory. That legislation was the Northern Rhodesia Police Ordinance of 1953 which, *inter alia*, allowed a police officer to regulate the extent to which music could be played on public roads or streets during festivities or celebrations.⁵²

The success of the Welfare Associations inspired Africans to form political associations such as the Northern Rhodesia African Congress which was formed in 1948, an offshoot of the Northern Rhodesia Federation of Welfare Societies.⁵³ However, by 1946 the colonial administration had established an African Representative Council consisting of members elected by Provincial Councils and four members nominated from Barotseland. The Council was chaired by the Secretary for Native Affairs. Two members were elected from the Representative Council to represent African interests in the territory's Legislative Council.⁵⁴ That was the official framework which enabled Africans to participate in the governance of the territory. However, bearing in mind the

overwhelming African majority over the white settlers in the country, two African representatives in the Legislature was almost a mockery.

The selection for nomination of the two candidates for membership of the Legislative Council was done by members of the African Representative Council from among themselves. A candidate had to be a "native of Northern Rhodesia and capable of speaking and reading English sufficiently to enable him to take an active part in the proceedings" of the Legislative Council.⁵⁵

Apart from the two African representatives, the franchise for voting and being elected to the Legislative Council was restricted to British subjects being 21 years of age or over with certain qualifications based on residence, education, property and income.⁵⁶ Africans were classified as British protected persons and not British subjects. Consequently, they did not qualify to vote unless they became British subjects, a very rare achievement in those days.

(v) Women's Rights

In any modern discourse on human rights, it is virtually impossible to avoid gender issues. Like their men-folk, African women were equally subjugated by the colonial administration. They could be taken by white settlers as concubines at will. Rural women were not allowed to accompany their husbands who went to seek employment in urban areas especially on the Copperbelt. Admittedly, customary practices in Zambia recognised the subordinate role of women. However, their influence in traditional societies through "the Kinship network" was great.⁵⁷ This is because most tribes in Northern Rhodesia are matrilineal. And in matters of adultery the traditional courts would always take the woman's word as gospel truth. So that if a woman admitted that she committed adultery that was the end of the story. In customary law the uncorroborated evidence of a woman was accepted in adultery cases.⁵⁸

It was provided under the Employment of Natives Ordinance that if a female resident servant marries during the contract, the employer was entitled to dissolve the contract and dismiss the female servant.⁵⁹ It was further provided that all written contracts of service for a married native woman

were to be executed by herself as well as by her husband unless she was not living with him at the material time⁶⁰

Generally, the colonial administrators did not encounter many problems with native women. Most women remained in rural villages even when their husbands went looking for jobs in urban areas. For example, in the early days of colonial administration, magistrates or colonial district administrators in Abercorn (now Mbala in the Northern Province) did not attempt to lay down rules or regulations for women. The attitude of colonial officers was that of turning a blind eye to the activities of African women.⁶¹

It cannot be denied, however, that despite their subordinate status, African women played a very significant role in the territory. They were the vanguard in the struggle for self-determination before and after independence. For example, they played a very important role in the first major strike in the mines on the Copperbelt in 1952. Their action resulted in the improvement of welfare facilities that the mining companies were providing to the African mine workers.⁶²

In the forefront of advocating the right to self-determination were women such as **Julia Chikamoneka** of the United National Independence Party (UNIP). She exhibited her wrath against colonialism by occasionally half-stripping herself. For married women whose husbands opted for freedom fighting, their role was even more arduous. The prospects of being woken-up at midnight and being left without their bread-winner were devastating.

In the field of education, colonial educational policies discriminated against Africans on grounds of race as well as sex. The enrolment of girls at primary school level was much lower than that of boys. Admittedly, the socialisation patterns of the African society had a significant negative influence on girls wishing to proceed to upper primary and secondary schools. But the colonial education policies further restricted women's educational opportunities in that girls were taught needlework, housewifery, cookery and general homecraft while boys were taught technical subjects and crafts courses.⁶³

(vi) Human Rights Cases in Colonial days:

It has already been noted that colonial courts dealt with the most serious criminal offences. The District or Provincial

Commissioners who presided over the lower colonial courts were primarily concerned with the maintenance of law and order especially among the indigenous population.

The dichotomy of **legal dualism** in Northern Rhodesia surfaced in many forms in the Courts of the day. For example, in 1947 there was the **Sosala** case at Mufulira which involved a European and an African. The European was accused of assaulting a 42 year old African fellow worker at Mokambo in the then Belgium Congo. The trial Magistrate at Mufulira convicted the 26 year old white South African. He fined the accused 3 pounds of which 1 pound was awarded to the complainant as compensation.

Despite there being no appeal by the convict, the Magistrate decided to refer the matter to the High Court by way of case stated. He sought the superior court's opinion as to whether, inter alia, the English legal citation in his judgement correctly stated the law of Northern Rhodesia on principles which could be applied when the action was between an African plaintiff and a European defendant. The then Acting Chief Justice Woodman accepted the English citations as being relevant and applicable to the case before the trial Magistrate. The Acting Chief Justice also opined that

it was not the intention of the legislators to confer upon the court the power to deny an African plaintiff the right to general damages for assault per se.⁶⁴

On a broader front, the introduction of European legal concepts into Africa brought with it difficulties of integrating such concepts with African concepts since these are based on different socio-cultural systems and norms.⁶⁵ In Northern Rhodesia, as elsewhere, Orders-in-Council were designed in such a way that in deciding cases involving native inhabitants and Europeans, colonial courts had to be guided by indigenous law provided such law was not repugnant to or inconsistent with relevant Orders-in-Council.⁶⁶

It cannot be denied, however, that the colonial administrator-cum-judge or magistrate always considered colonial law as superior to African customary law. Colonial courts mainly dealt with the most important civil issues and the most serious criminal offences. Even to-day no local court in Zambia has jurisdiction over an offence which is likely to be punishable by death.⁶⁷

The English dual system was discriminatory in that it placed the African customary judicial system at the base of

the country's judicial hierarchy and treated it as primitive. No legal representation was allowed in a native court except in respect of a criminal charge. Unfortunately, this mischief in civil matters is still being perpetuated today.⁶⁸

Since Africans were denied basic human rights despite their numerical superiority, very few cases concerning human rights issues went before early colonial courts. However, as the **Sosala** case 1947 shows, the few cases which found their way to the court indicate that colonial judges were prepared to dispense justice. For example, in **Chilembo's** case 1963, the accused was convicted on his own plea of breaking an order of deportation contrary to the provisions of the Immigration Act, 1954. On 5th March, 1964 he was found at Kitwe despite being a person who had been ordered to leave Northern Rhodesia.

The trial Magistrate referred the matter to the High Court for review as he was of the opinion that the accused should not have been convicted. Mr. Justice Ramsay declared that the courts have jurisdiction to go behind the face of a deportation order and query its validity. The Court further found that the trial Court should not have accepted a plea of guilty where the accused claimed that he was either born in

Northern Rhodesia or that he was a British protected person. The learned judge reversed the decision of the lower court.⁶⁹

In an earlier case of **Labson Chipili and 3 Others**, 1949, the court was prepared to substitute a sentence of imprisonment with a fine because there was considerable delay in getting the case down for appeal. That case emphasised the right to a fair trial and that justice delayed is justice denied.⁷⁰ In **Chambata v. The Queen**, 1949, Mr. Justice Somerhough of the High Court sitting at Fort Jameson (now Chipata) confirmed the **right of residence** of the defendant who was ordered by the Kalindawalo Native Court to move his village from Chief Nyampande's area on an allegation that the said defendant was a trouble-maker.⁷¹

However, in **De Jager's** case of 1935 the Court was faced with the question of freedom of conscience through religious beliefs. The accused who was a representative of the Watch Tower Bible Tract Society, was found in possession of four books entitled 'Deliverance' and one book entitled 'Jehovah' which were prohibited publications by Proclamation of the Governor. He was charged with two offences of possessing and distributing prohibited materials. He appealed to the High Court from the Resident Magistrate's

judgement which found him guilty and fined him 2 pounds on each count. On appeal, the High Court dismissed his appeal. Mr. Justice Francis opined, *inter alia*, thus:

Politico-religious discussion among the educated invariably excites controversy and its propaganda among primitive people quite feasibly leads to misconception.

The learned judge went on to say:

Deprivation of this type of literature is not an interference with any principle of natural justice⁷²

The Court placed emphasis on the "Subversive influence" which the publication would have "on the natives."⁷³ Leave to appeal to the Privy Council in Britain was refused. On petitioning the Privy Council, the Petition was also dismissed. Both the High Court and the Privy Council took a seemingly racialistic stance by emphasizing the so called "subversive influence" which the publications would have on the so called "primitive natives".⁷³

Similar sentiments were expressed by the Court in **Rex v. Chona** in 1962. Mainza Chona was charged with publishing a seditious document called "Press Statement" in which he attacked the colonial administration for employing oppressive tactics against Africans. Chief Justice Diarmaid Conroy sitting as a High Court judge found that the sedition was grave presumably, because it could have had a subversive influence on Africans against the administration. Fortunately for the accused, the Court also found that the so-called 'Press Statement' was not widely publicized. It was limited to Police Headquarters. Chona was sentenced to six months imprisonment with hard labour (IHL) but the sentence was suspended for three years subject to good behaviour.⁷¹

Before the Chona case the country was already facing an African movement for political self-determination and the colonial administration had enacted the Northern Rhodesia Police Ordinance in 1953. The British Public Order Act was borrowed by the Northern Rhodesia Legislature for use in combating the stirrings of indigenous nationalist leaders who advocated independence from Britain. Cases of unlawful assembly increased resulting in many freedom fighters being jailed.

CONCLUSION

In pre-colonial Zambia indigenous judicial institutions administered justice based on ethnic systems. During this period concepts of human rights were not unknown. With the advent of colonialism an extraneous law and judicial system were introduced in the territory and these existed side by side with the indigenous judicial and legal system.

The duality of law and courts encouraged the administration of justice along lines of race and colour. It imposed standards on Africans as a result of which the development of African law remained stagnant. It introduced too formalistic and hence complicated European procedures in dealing with dispute settlement among the indigenous population.

Although indigenous laws and procedures were recognised, imported laws treated them as an inferior component of the whole justice system of the country. The superimposition of Western law on indigenous law and the concomitant subordination of the latter had led to a steady decline of the African indigenous legal and judicial system over the years.⁷⁵

In the early days of the British South Africa Company the British Courts were not well equipped. They were usually under-staffed and only serious crimes were taken to them. Native Courts were the dispensers of whatever justice existed for Africans in that judicial structure. The enjoyment of human rights for the indigenous Africans was a pipe-dream. Most colonial laws were oppressive to Africans. For example, the Legislative Council Order-in-Council (1924-1964) made no provision for Africans to vote during any election in the territory. The Employment of Natives Ordinance imposed numerous limitations on Africans relating to movement, residence and conditions of service both within and outside the territory.⁷⁶

The Penal Code defined sedition and seditious intention so widely that it covered anything that appeared to excite disaffection against the Queen, her heirs or the Government of the territory.⁷⁷ The Northern Rhodesia Public Order Ordinance of 1955 was used by the colonial administrators to severely suppress Africans in their quest for self-determination.⁷⁸ Unfortunately, as will be shown in subsequent discussions, these draconian pieces of legislation have continued unabated in the post-colonial era despite the entrenchment of a Bill of Rights in the Zambian Constitution

Chapter Two

End Notes

1. See, for example, various contributions in the African Law Association (ed) **The African Charter on Human and People's Rights: Development, Context, Significance**. S & W Druckerai, Marburg, (1991) See also various articles in **Human Rights in Africa: Cross Cultural Perspectives**. Collected by Abdullai An-Na'm and Francis Deng (eds) The Brookings Institution (1990) Washington, DC.
2. Allot, Antony, 'Human Rights in Africa and African Legal Systems' a paper delivered at the 3rd Biennial African Bar Association Conference held in Freetown, Sierra Leone. 1st - 5th August, 1978.
3. Deng, Francis M., 'A Cultural Approach to Human Rights Among the Dinka' in **Human Rights in Africa: Cross Cultural Perspective** - An Na'm and Deng (eds) *supra*, note 1.

- 4 Asian-African. Report of the **Legal Consultative Committee**: New Delhi, India and Oceana Publications, Inc. Dobb, New York, USA (1973)
Vol. Two, p. 1723 et seq.
- 5 Benn, S.I and Peters, R.S., **Social Principles and the Democratic State**, George Allen and Unwin Ltd. London (1959), p.23.
- 6 For example, the Ngonis of the Eastern Province and the Bambas of the Northern Province had and still have Paramount Chiefs Mpezeni and Chitimukulu respectively. In the case of Western Province the Lozis had and still have the Litunga or King Lewanika.
- 7 Allot, *supra*, note 2.
- 8 Most Tswana laws and customs appear to have developed out of these taboos as in Zambia: See Schapera L., **A Handbook of Tswana Law and Custom**, Frank Cross & Co Ltd; London, (1938), p 39.

9. Milner, Alan (ed), **African Legal Systems**, Routledge & Kegan Paul, London 1969, p.6. See also Lord Hailey, **An African Survey: A Study of Problems Arising in Africa South of the Sahara**, Oxford University Press, London (1957), p 625.

10. Schapera, I., *supra* note 8 at 261.

11. Gluckman, Max., 'The judicial Process Among the Barotse of Northern Rhodesia' in **Readings in African Law**. Neville Rubin and Eugene Cotrain (eds) Vol.1 Africana Publishing Corporation, New York, 1970.

12. Manga, Mutumba, **Bulozi Under the Luyana Kings: Political Evolution and State Formation in pre-colonial Zambia**, Longman Group Ltd, London (1973), p.52.

which seems to have made the African exceptionally sensitive over land issues" p. 685.

17. Dr. Vukani Nyirenda argues that the rural Zambian woman was the conerstone of traditional society and occupied a secure and powerful position despite the appearance of occupying a lower status to her male counter-part. See 'The Changing Status of the Urbanised Zambian Woman: Implications for Social Service Provision' in the **Zambia Association for Research and Development (ZARD) Bibliography** (1985).
Annotation No. 78 p. 77.

18. The Tswanas have a similar belief known as **thogo** or **go hutsa** See Schapera, *supra* note 8 p.181.

19. Oliver, Toland and Atmore, Anthony...
Africa Since 1800, Cambridge University Press, Cambridge, 1972 at 112. Early British explorers such as Mungo Park (1771 - 1806); David Livingstone (1813-1873) Sir Henry Stanely (1841-1904) were among the early pioneers of the African continent.

20. A colony is an area or country held by another country.

It is usually acquired by discovery, occupation, conquest or cession. Colonisation is often associated with the exploitation of the weak people by the coloniser, especially for economic purposes.

21. Rotberg, R.I., **The Rise of Nationalism in Central Africa: The Making of Malawi and Zambia 1873 - 1964**, Havard University Press, 1965, p.25

22. The Legislative Council comprised nine officials and five elected white settlers. The Executive Council comprised officials only who also sat in the Legislative Council.

23. It was not until 1929 that the Colonial government gave formal recognition to the judicial authority of native Chiefs when the Native Authorities and Native Court Ordinances were introduced in that year. Chiefs presided over Native Courts in their

respective areas and were usually assisted by elders or advisers.

24. The growth of urban African Communities created special problems in the judicial system of the natives. At the time when Native Courts were established it was envisaged that their jurisdiction would be limited to their respective tribal areas. But with the influx of different indigenous groups into urban areas, a solution had to be found to resolve the divergent traditional customs.

25. Moffat, R.L. 'African Courts and Native Customary Law in Urban Areas of Northern Rhodesia' **Journal of African Administration**, Vol. ix, No. 2, April, 1957, p. 73

26. Lord Hailey, *supra* note 9, pp 490 - 491.

27. *Ibid*, pp 611 - 612.

28. Hoover, Piper and Spalding. 'The Evolution of the Zambian Court System' in **Law in Zambia**,

Muna Ndulo (ed) East African Publishing House,
Nairobi (1984) at p.59.

29. Lord Hailey, *supra* note 9, p. 612.
30. Under the Northern Rhodesia Order-in-Council of 1924 as amended by the Northern Rhodesia (Amendment) Order-in-Council of 1939 a joint Appeal Court was created to which appeals from High Courts of Northern and Southern Rhodesia lay. By the Northern Rhodesia (Amendment) Order-in-Council of 1947 the Rhodesia and Nyasaland Appeal Court was created which, during the period of the Federation, was re-named the Supreme Court of Rhodesia and Nyasaland.
31. See Northern Rhodesia Order-in-Council dated 20th February, 1924, when the office of the Governor was created and the Executive and Legislative Councils were constituted.
32. Lord Hailey, *supra* note 9, p. 597.

33. See Section 2 of the Employment of Natives Ordinance, Chapter 171 of the Laws of Northern Rhodesia.
34. Meebelo, Henry S., **African Proletarians and Colonial Capitalism**, Kenneth Kaunda Foundation, Lusaka (1986) p.30.
35. Note 33 Supra note 33 section 45.
36. Ibid, Section 2.
37. Rotberg, R.I. supra note 21 noted that the government of Northern Rhodesia strictly regulated the movement of Urban Africans p. 51.
38. Regulation 65, supra note 33.
39. It is not known where the word **Changachanga** originated from but it is associated with Bemba usage in the Mining area (Copperbelt) of Zambia.

40. See for example

Rhodesia Broken Hill Development

Company Ltd v. Jacob Mwengwe,

Northern Rhodesia Law Reports (1945 - 48) p. 41

41. See **Rex v. Kabunda and Five Others,**

Northern Rhodesia Law Reports (1945 -48), p. 38.

42. Rotberg, *supra* note 21, p. 54.

43. Mwanakatwe, J.M. **The Growth of Education**

in Zambia since Independence,

Oxford University Press, Lusaka. 1974 p. 17.

44. *Ibid*, p. 21.

45. Rotberg, *supra* note 21 at p. 35. See also Mwanakatwe,
supra note 43, Revised Edition p.37.

46. Lord Hailey, *supra* note 9 p. 685 et seq.,
also *supra* note 43 p. 14

47. The Northern Rhodesia (Crown Lands and
Native Reserves) Order-in-Council, 1928 to 1964.

48. Ibid, Section 2.
49. Native Trust Lands Order-in-Council,
October, 1947, Section 2.
50. A Report of the Commission of Inquiry into
Land Matters in the Southern Province.
June, 1982, Chapter xiv p. 117.
51. Mwanakatwe, J.M. **End of Kaunda Era**, Multimedia
Publications, Lusaka, Zambia 1994 p. 15.
52. Northern Rhodesia Police Ordinance, No. 5 of 1953.
For a detailed discussion on the Northern
Rhodesia Police Ordinance of 1953, See article by
S. Ruedisili, 'Zambia's Elusive Search for a valid
Public Order Act: An Appraisal', **Zambia Law
Journal** Vol. 25-28 (1993-96) p. 1-65.
53. Mwanakatwe, supra note 51, p. 17
54. Lord Hailey, supra note 9 p. 492 and see
also the Northern Rhodesia
(Legislative Council) Order-in-Council
of March, 1945, Section 9A.

63. For a detailed discussion of girls' education in colonial Zambia, see Snelson, P.D.
Educational Development in Northern Rhodesia, 1833-1945, NECZAM, Ndola (1974) p. 242 ff.
64. **Sosala Kayela v. Willem Jacobus Botes,** Law Reports of Northern Rhodesia (1945-1948) p. 183.
65. Lord Hailey, *supra* note 9 pp. 587, 590-1.
66. *Ibid*, p.599.
67. See Section 11 of the Local Courts Act.
68. *Ibid*, Section 15.
69. **R v. Joseph Chilemba.** Zambia and Northern Rhodesia Law Reports (1963-64) p. 116.
70. Per Chief Justice Sir Herbert Cox,
Criminal Appeal Case No 98 of 1949,
Law Reports of Northern Rhodesia, Vol. V Part I (1949-54) p. 23.

71. Ibid, Criminal Appeal Case No. 38, p. 297.
72. **Rex v. De Jager** (1931-37) N.R.L.R 13, p.23.
73. Ibid, p.24.
74. **Rex v. Chona** (1962) R & N L.R 344
75. Anyangwe, C., 'The Whittling Away of African Indigeneous Legal and Judicial System', **Zambia Law Journal**, Special Edition, 1998, p. 46.
76. Chapter 171 of the Laws of Northern Rhodesia.
77. Penal Code Ordinance, Cap 6 Section 53 G(1)
1955 Edition of the Laws of Northern Rhodesia.
78. Chanda, A.W., **Zambia: A Case Study in Human Rights in Commonwealth Africa**, QSD Thesis, Yale University (1992) p.84. A detailed discussion is contained in Chapter 2 on Human Rights.

CHAPTER THREE

THE BILL OF RIGHTS

Introduction

Most national constitutions in the world now provide for a Bill of Rights for the protection and promotion of fundamental rights and freedoms of the individual and of groups. This Chapter will consider what is meant by a "Bill of Rights" and how the standards set by the United Nations have been incorporated into the Zambian Constitution. It will also consider the legal mechanisms which provide for the protection and promotion of those rights and freedoms. The Chapter will then analyse and examine the principles and the effect of **derogations** or **exception clauses** which have been incorporated in the Zambian Bill of Rights.

SECTION1: Bills of Rights

A Bill of Rights is a written declaration, charter or instrument which sets out the standards upon which states or institutions, whether political or judicial, undertake to protect and promote individual or group rights and freedoms¹. It is often incorporated in national constitutions detailing specified rights and freedoms which the state or institution is legally or morally obligated to observe. A Bill of Rights can be useful to protect individuals in a State against possible abuse of human rights by an all-powerful and intolerant government which even the judiciary might have no courage to control². A Bill of Rights therefore, often promotes the concept of justice and equality through the rule of law.

Since the earliest recorded human rights revolutions started in England the use of the words "Bill of Rights" is believed to have originated from the English with the Bill of Rights of 1689. The two earlier English human rights documents were styled the 'Magna Carta' and the 'Petition of Right' (1628). In 1689, the new standard phrase "Bill of Rights" came into use³. Since then the phrase has been adopted in America and Commonwealth countries. Some major consequences of entrenching a Bill of Rights in a national constitution are that such a bill becomes the supreme

norm of the state as far as human rights are concerned. The amendment of such a Bill of Rights very often requires a national Referendum or a two thirds majority in Parliament.⁴

SECTION 2: Domestic Legislation

Under preambular paragraph eight of the Universal Declaration of Human Rights, State parties are seemingly expected to incorporate human rights provisions in their domestic legislation⁵. At the attainment of independence in the 1960s most former British territories incorporated human rights provisions in their constitutions and Zambia was no exception⁶.

A. Incorporation of a Bill of Rights in the Constitution of Zambia

It was in 1963 that a Bill of Rights was incorporated in the Constitution of Northern Rhodesia which became Zambia a year later⁷. The Zambian Bill of Rights is contained in Part III of the Constitution. It has remained in Part III since independence. It is titled, "Protection of Fundamental Rights and Freedoms of the Individual". These fundamental rights and freedoms run from Article 11 to 26 inclusive.

Protective **Sections** 1 to 13 inclusive in the Northern Rhodesia Constitution of 1963 were reproduced verbatim in the subsequent Constitutions of Zambia as Article 11 to 23 inclusive. However, the protection of young persons was included in the Zambian Constitution as Article 24. Of some significance is the fact that the Northern Rhodesia Bill of Rights did not incorporate a Section entrenching **derogations** from the protective provisions as did the Zambian Constitution under Article 25.

In 1960 Her Majesty's Government in the United Kingdom appointed the Monckton Advisory Commission to review the Constitution of the Federation of Rhodesia and Nyasaland which the indigenous Africans in all the three territories abhorred.

The Advisory Commission reported that most of the witnesses who appeared before it expressed concern over the lack of more effective safe-guards with respect to fundamental human rights. Africans did not trust the legislatures of the present.

Africans had grave doubts about a legislature which was dominated by whites. In turn, Europeans had expressed

grave doubts about the effectiveness of existing human rights safe-guards in future legislatures which might be dominated by African freedom fighters. The Commission concluded that all races were gripped by the fear that their rights could be infringed or prejudiced by either the Federal or the Territorial Legislatures"⁸. So the inclusion of Bills of Rights in Territorial Legislatures was inevitable, especially if the Federation was dissolved and Africans came into power. The Commission accordingly recommended the incorporation of fundamental human rights in the Federal and Territorial Constitutions of the then Federation of Rhodesia and Nyasaland.

The recommendation of the Monckton Advisory Commission was not an entirely new idea. As far back as 1889, the Charter of the British South Africa Company guaranteed religious freedom for Africans provided it was not repugnant to morality or the interests of humanity. The Charter also included a clause to protect the rights of Africans to acquire land on similar terms as the white settlers⁹. In 1953 when the Federation of Rhodesia and Nyasaland was created, provision was made in the Federal Constitution for the protection of African interests. For example the African Affairs Board of the Federal Parliament was intended to be an institutional

safeguard for the interests of Africans in the Federation and its three territories¹⁰. But those provisions were focussed on group interests rather than individual rights and freedoms.¹¹

It must not be assumed that the entrenchment of a bill of rights in a constitution is a **panacea** for the protection and promotion of human rights. Experience in Africa and most importantly in a multi-racial and multi-tribal society like Zambia, has shown that that is not the case. Rights and freedoms are meaningless unless individuals or groups of individuals in that society develop a culture or tradition of respect for those rights and freedoms. Furthermore, most Bills of Rights have limitations and derogations. Additionally the rights and freedoms are not absolute.¹²

Further still, during periods of states of emergency even the so-called entrenched rights and freedoms are infringed with impunity by the Executive and even by legislators who are supposed to be the protectors of such rights¹³.

B Salient Features of the Zambian Bill of Rights

It cannot be disputed that the International Bill of Human Rights had considerable influence on the format and content of the Zambian Bill of Rights. Common preambular paragraphn 1 of the Universal Declaration of Human Right and of the two principal human rights Covenant of 1966 open with a general recognition of the inherent dignity and the equal and inalienable right of all members of the human family as being the foundation of freedom and peace throughout the world.

The Zambian Bill has a similar Preamble, followed by a detailed catalogue of fundamental rights and freedoms of the individual. The human rights guarantees contained in the constitution of nascent State attest to the deep influence of the International Bill of Human Rights upon domestic law.¹⁴ In Zambia, the catalogue of rights and freedoms is a reproduction of the European Convention almost **ipsissima verba**, that is almost word for word.

The constitutionalisation of Bill of Rights in post independence Commonwealth African States took the form of what popularly known as the neo-Nigerian model because

Nigeria was the first country to incorporate it in its constitution in 1960.^{14a}

(i) Declaratory Article 11

Article 11 of the Constitution declares that every person in Zambia shall be entitled to the fundamental rights and freedoms of the individual whatever his race, place of origin, political opinions, colour, creed, sex or marital status. But these rights and freedoms are subject to limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice another individual or the public interest. However, the limitations are so wide that most of them are inconsistent with permissible limitations under international human right law.¹⁵ Article 11 is a prefatory Article whose provisions have to be read with the specified rights and freedoms under Articles 12 to 26 inclusive. However, Article 28 contains enforcement provisions which include Article 11 for purposes of redress in the High Court.

(ii) Individual not People's or Community Rights

Despite the fact that Zambian native jurisprudence recognises group or people's rights the Zambian Constitutional

Bill of Rights focusses attention only on the individual rights. This is not suprising because even in the colonial days, particularly during the Federation, African nationalists themselves did not see the need to protect minority or other collective rights. In their eyes the minority was the white community and it was not felt that whites needed any protection under the constitution. It was often argued that the protection of individual rights was the best protection for minority or group rights especially in a multi-racial or multi-tribal society like Zambia.¹⁶

Unfortunately, this Zambian approach contrasts with the concept of the African Charter on Human and People's Rights which Zambia has ratified. The Charter does not only recognise individual rights and freedom but also acknowledges the existence of communal rights in an African society.¹⁷

(iii) The Bill applies to Every Person in Zambia

In line with international human rights instruments, the Zambian Bill of Rights protects the rights of every person in Zambia regardless of nationality, race, colour, sex or political

views. Thus, the protective provisions are not limited to citizens only. The preambular Article guarantees the domestic application of such international human rights norms as have been incorporated in the Zambian Constitution. There is an implied commitment, in the Zambian Bill, to apply universal human rights standards.

(iv) Mandatory Provisions

Again, in line with international human rights instruments and subject to limitations as provided by other laws, the protective provisions are mandatory in form. For example, a person **shall** not be deprived of his life.....; **shall** not be deprived of his personal liberty; **shall** not be held in slavery. Article 14(1) of the Constitution provides that no person shall be held in slavery or servitude. The provision contain no derogation. And yet most domestic servants and farm workers in Zambia are in fact paid salaries which can be described as slave wages. Similarly, Article 15 provides that no person shall be subjected to torture, inhuman treatment or degrading punishment or other like treatment. Here too there is no derogation. Yet, torture in police cells or detention centres is rampant.¹⁸

(v) Derogations or Exception Clauses

The Preamble to the constitutional provisions for the protection of fundamental rights and freedoms of the individual make it very clear that such rights and freedoms are subject to limitations or derogations. As already stated such derogations appear to be designed to ensure that the rights and freedoms of other individuals are not prejudiced and that the public interest, peace and order are maintained. Thus, there are several derogations and limitations or exceptions which have the effect of giving with one hand and taking away with the other. These derogations will be discussed below within the context of the rights and freedoms entrenched in the Bill of Rights.

SECTION 3 Specified Rights and Freedoms

A common approach in human rights discourse has been to classify rights in terms of "generations". Thus, the first generation of human rights is said to encompass civil and

political rights while social, cultural and economic rights are treated as second generation rights. Third generation rights comprise of the rights to development, the right to self-determination, rights to peace, and healthy environment.¹⁹

The list of specific rights and freedoms entrenched in Part III of the Constitution consists of first generation rights which are found in the International Covenant on Civil and Political Rights (ICCPR). Despite being a State party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) which contains second generation rights, Zambia has continued to concentrate its attention on the first generation rights. It is amazing that the 1996 Constitution which was a result of a review of the 1991 Constitution made no attempt to incorporate second and third generation rights in the country's Bill of Rights. Thus, on the eve of the second millennium, only a timid attempt to redress this human rights lacuna was made by the constitution-makers of Zambia. This was by way of the **unjusticiable** Directive Principles of State Policy and the Duties of a Citizen.²⁰

However, the inclusion of a Chapter on **Directive Principles of State Policy** in the 1996 Constitution was innovatory for Zambia.²¹ The Constitution provides that the

Directive Principles of State Policy shall guide the Executive, the Legislature and the Judiciary in the development and implementation of national policies and in the enactment of relevant laws²². However, there is an ouster Article which provides that despite these provisions, any rights mentioned therein "shall not be legally enforceable in any court, tribunal or administrative institution or entity"²³.

The rationale behind the inclusion of these **unjusticiable** rights in the 1996 Constitution is not clear especially since the Government had rejected their inclusion as recommended by the Mwanakatwe Constitutional Review Commission²⁴.

(i) Right to Life

One of the most basic fundamental human rights is the right to life. It is also one of the most controversial subjects in human society.

Article 12 of the Constitution provides that no person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under

the law in force in Zambia, of which he has been convicted.²⁵ The Constitution also permits killing under certain circumstances such as in self-defence, in defence of property, to effect a lawful arrest or to prevent the commission of a criminal offence.²⁶

Thus, under the Penal Code killing someone in self-defence as in the **Rosalyn Thandiwe Zulu** in 1981 is not an intentional deprivation of a person's life.²⁷ Mrs Zulu was convicted of the murder of her husband. After an altercation at their home in Makeni, in Lusaka, she had grabbed his pistol and shot him with it. On appeal the Supreme Court set aside the conviction and acquitted her on the ground that she had acted in self-defence under extreme provocation.

It is also justifiable to kill in order to prevent or resist the commission of a crime as in **Chibabe Hangumba's** case²⁸. Hangumba was charged with the murder of Hlabanyama in Mazabuka District. One of the accused's defences was that he was preventing the commission of a crime. The accused was acquitted on both charges of murder and manlaughter. It can not be disputed that this constitutional derogation is justified in these circumstances.

Apart from constitutional provisions there are other provisions under a number of legislative instruments that appear to safeguard the right to life. For example, under Section 306 of the Criminal Procedure Code²⁹ and Section 25(4) of the Penal Code³⁰ a pregnant woman convicted of an offence which is punishable with death can not be executed presumably, because it would entail killing an innocent child. There is however, no provision for executing the convict after she has given birth. Similarly, under Section 25(2) of the Penal Code, a death sentence can not be imposed on a person below 18 years of age, presumably, because a person below that age is held not to be criminally responsible for any act or omission³¹. However these provisions merely absolve the culprits from criminal liability but do not abolish the death penalty.

There is also a provision under the Constitution which has saved a number of convicts from the death penalty. Article 59 of the Constitution of Zambia provides for the exercise of the **prerogative of mercy** by the President. This provision was invoked by the President in the Second Republic when dealing with those convicted of treason in the coup

attempt of 1980 in which a leading member of the Zambian Bar, Edward Shamwana was involved ³²

Under the said Article 59 the President may grant to any person convicted of any criminal offence a **pardon**, either free or subject to lawful conditions. The President may also substitute a less severe punishment, such as life imprisonment instead of a death penalty.

In March, 1995 Amnesty International observed that although the death penalty had been retained in Zambia both the past and present governments had exhibited some reluctance over the signing of death warrants for the execution of convicted prisoners³³. But in July 1997, Human Rights Watch (Africa) commented that while the Zambian government "adopted a language of human rights... the administration has in reality taken several steps backward in human rights observance." That was the organisations response to a report that on 24th January, 1997 eight condemned prisoners had been executed at Mukobeko Maximum Security Prison at Kabwe³⁴.

Although Zambia has not abolished the death penalty the global trend is moving towards its abolition. In

neighbouring countries of South Africa, Namibia, Angola, Mozambique and Mauritius the death penalty has been abolished. For example, The Constitution of the Republic of Namibia provides that:-

The right to life shall be respected and protected. No law may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia.³⁵

And the South African Constitution emphatically guarantees the right to life and provides that:-

"Everyone has the right to life"³⁶

Unfortunately even in these countries which have abolished the death penalty the issue still remains controversial. In Namibia, for example, Courts are perceived as being lenient in the absence of the death penalty.³⁷ Similar apprehensions about the abolition of the death penalty have continued to be expressed in South Africa.³⁸

In Zambia the debate whether or not to abolish the death penalty has continued. The problem seems to lie in the permissive nature of the provisions of Article 6(2) of the International Covenant on Civil and Political Rights. These provisions permit State parties to impose death sentences "for the most serious crimes in accordance with the law in force at the time of the commission of the crime..." For those member states not keen on abolishing the death penalty, this provision creates an ideal escape-route.

However there is a Second Optional Protocol to the ICCPR which came into force in July 1991. The Protocol aims at abolishing the death penalty. Once a state party signs the Protocol, then no one within its jurisdiction can be executed. But Zambia has not yet ratified this Protocol.

(ii) Right to Personal Liberty

Article 13(1) of the Constitution provides that no person shall be deprived of his personal liberty save as may be authorised by law. This provision is also found in Article 9(1) of the International Covenant on Civil and Political Rights.

(ICCPR). But the **Zambian Article** contains many **exceptions** covering a wide range of legal, social, medical and political situations. For example, the right to personal liberty may, by court order, be denied to criminal offenders or suspects, mental patients, drug or alcohol addicts, people with contagious diseases, illegal immigrants and restricted persons. In fact for some persons in these categories, the deprivation or restriction of liberty may continue indefinitely.³⁹ The right to personal liberty is one of those rights which are easily abused by the Executive arm of the State or its agents

Article 13 contains numerous exceptions backed-up by a number of Acts of Parliament which have eroded any semblance of personal liberty. For example, there is still in existence the Emergency Powers Act and the Preservation of Public Security Act⁴⁰. The provisions under these Acts can be used extensively to deprive people of their personal liberties. Additionally, amendments to Section 123 of the Criminal Procedure Code have severely restricted the right to bail against persons charged with offences likely to carry a death sentence.⁴¹ Similarly, bail is often not granted to those charged under the Narcotic Drugs and Psychotropic Substances Act⁴²

The Immigration and Deportation Act was used in the recent cases of **William Banda**, and **John Chinula** in removing them from Zambia. Both were said to be **persona non grata** in Zambia. They were alleged to have emigrated from neighbouring Malawi and to have lived in Zambia illegally for many years⁴³. No consideration was given to their length of stay in Zambia before their alleged transgressions. Neither did the Immigration authorities nor the Courts pay attention to the fact that the main seat of their activities and prolonged residence was in Zambia and, therefore, their deportation was highly irregular. Furthermore, the Courts did not draw their attention to the famous international case of **Nottebohm in Liechtenstein v. Guatamala** in which principles of the right to residence which implies the right to personal liberty were propounded by the International Court of Justice.⁴⁴

(iii) Protection from Slavery and Forced Labour

Article 14 provides that no person shall be held in slavery or servitude. It also provided that no one shall be required to perform forced labour **except** convicted persons; members of a disciplined force; labour required in times of

war or national emergency. Labour reasonably required as part of normal communal or other civic obligations. However, these exceptions are aggravated by a very weak Employment Act⁴⁵ and a somewhat nebulous Industrial and Labour Relations Act No. 27 of 1993. Yet, Zambia has domesticated the ILO Convention against Forced Labour and Collective Bargaining with the latest amendment to the Industrial and Labour Relations Act which has abolished the monopoly of the Zambia Congress of Trade Union (ZCTU) as a sole Congress of Trade Unions in the country.

Slavery and servitude are very wide concepts and in modern society these concepts operate in very sophisticated forms. For example, because of prevailing austere economic conditions people are forced to accept work under slave conditions and receive what literally could be described as slave wages. Under such conditions women and children are forced to perform menial labour or even engage in prostitution. Contemporary forms of slavery have taken many shades such as **debt bondage**, forced recruitment of children for military service and selling of women and children.⁴⁶

(iv) Protection from Inhuman Treatment

Article 15 provides that no person shall be subjected to torture, or to inhuman or degrading punishment or similar treatment.

The concern about the death penalty in Zambia, as elsewhere, is that it is intricately associated with torture and inhuman treatment. The process from the time of conviction to execution usually lasts years. The torment, worry and anxiety while waiting for being executed must be excruciating⁴⁷. In **Rosalyn Thandiwe Zulu**, for example, the accused who was represented by this writer was sentenced to death by the Court below. It took nearly two years to have her acquitted by the Supreme Court. By that time she had almost gone mad.⁴⁸

Brutalities by police and security personnel are still rampant in Zambia. In 1993 at least 19 extra-judicial killings of criminal suspects were recorded.⁴⁹ Corporal punishment has not been abolished in Zambia. And yet Article 15 of the Constitution is one of those very few Articles bearing no

derogations whatsoever. On the contrary, Zimbabwe and Namibia have abolished corporal punishment.⁵⁰

(v) Protection from Deprivation of Property

Property ownership is protected under Article 16 of the Constitution. The Article provides that no property of any description or interest in or over such property shall be compulsorily taken away or acquired unless there is an Act of Parliament which provides for payment of adequate compensation for the said property or interest.

However, such protection as there is, is seized of numerous exceptions or derogations. The usual catch phrase is "nothing contained in or done under the authority of any law shall be held to be inconsistent with the provisions of the Article." Thus, if the compulsory acquisition is in respect of paying taxes, rates or dues; or as a result of civil or criminal proceedings; or if the land in question is abandoned, unoccupied or undeveloped the action of the state in taking possession of the property even without compensation would be justifiable at law.

Similarly, if the property belongs to a non-resident or absentee landlord; or if it is in a dangerous state or if it is

required for mineral exploitation or for the implementation of a comprehensive land policy, the compulsory acquisition would be justifiable. And generally, if the President is of the opinion that it is desirable or expedient to do so in the interest of the Republic the state would be justified in acquiring the property in issue.⁵¹

The President's opinion in deciding which property to acquire in the public interest is subjective. Provided the discretion is exercised fairly and without **mala fides** (bad faith) it cannot be challenged. Bad faith is, in many cases, very difficult to prove in Court because the **onus** of proof lies on the person alleging it. Both the previous and the present Governments have used these exceptions to compulsorily acquire property or land from Zambian citizens, residents or foreigners. The Lands Acquisition Act is supplemented by the relevant provisions in the Preservation of Public Security Act which lend justification to such government action. Mr. Justice Bobby Bwalya dealt extensively with Presidential discretion, mala fides and the public interest in the **William David Wise Case**.

This case involved the compulsory acquisition by the State of two farms belonging to Mr. Wise at Mazabuka in the

Southern Province under the provisions of the Land Acquisition Act, 1970. He sued the State and alleged **mala fides** in the exercise of Presidential discretion in the compulsory acquisition of his land. He succeeded and the Court awarded him damages. The State was also condemned in costs. The Court found that the acquisition of the farms by the State and then immediately letting them to another lessee was not in the public interest. The mala fide was aggravated by the detention and subsequent deportation of William Wise.⁵²

However, in **Zambia National Holdings and UNIP v. Attorney-General**, the petition to challenge the decision of Government to acquire property compulsorily from UNIP in 1992 on the ground of mala fides was unsuccessful. Although using different routes, both the High Court and the Supreme Court adjudged in favour of compulsory acquisition of the proposed UNIP new Party Headquarters in Lusaka by Government. The Supreme Court opined that since UNIP formed the Government of the day and was in control of public funds which Parliament disbursed to construct the new Party Headquarters, the property was held in trust for the people of Zambia.⁵³ Considering the fact that in the one-party

state, UNIP and the Government were virtually the same, the Supreme Court's reasoning was right.

(vi) Privacy of Home and other Property

Article 17 provides that except with his own consent, a person shall not be subjected to the search of his person or his property or the entry by others on his premises. However, the protection is not limitless. The protection can be derogated from if it is in the interests of defence, public safety, public order, public morality and public health. The protection can also be denied if the action is reasonably justifiable in a democratic society. Unfortunately, concepts like 'reasonably justifiable in a democratic society' are somewhat nebulous and therefore difficult to define. Consequently, the powers of Courts in protecting human rights in this sphere are seriously restricted. Officers or agents of Government are authorised to enter premises for specified purposes in connection with their work such as enforcing Court Orders. It is often difficult to prove that such actions are not reasonably justifiable in a democratic society. The concept of what constitutes justifiability in a democratic society is highly contentious. Neither has Parliament attempted to define these somewhat vague concepts.

This concept of what is justifiable in a democratic state has exercised the minds of Zambian Courts in at least three cases: **Kachasu v. Attorney-General**,⁵⁴ **Patel v. Attorney-General**⁵⁵ and more recently, **Christine Mulundika & Seven Others v. The People**.⁵⁶ In **Kachasu** the Petitioner was suspended from School under the Education Act because she refused to sing the National Anthem and to salute the national flag. The learned Chief Justice John Blagden sitting as a High Court judge found that the suspension was justified as being

reasonably justifiable in a democratic state and was authorised by laws which were both reasonably required in the interest of defence and for the purpose of protecting the rights and freedoms of other persons.....

The following year another attempt was made by Mr. Justice Magnus in the **Patel** case to explain the term "democratic society" and what would be reasonably justifiable in such a society. **Jasbhai Umedbhai Patel** was charged with doing an act preparatory to the making of a payment outside Zambia contrary to the then Exchange Control Regulations. His property was searched and seized.

Patel raised issues regarding his right to privacy of property, his right to protection from deprivation of property and his right to freedom of expression. After a lengthy judgment the learned trial judge found that the actions of the Government agents were reasonably required for the specific purpose and were therefore reasonably justifiable in a democratic society. The learned trial judge considered various attributes of a democratic society and opined thus:

.....there was certain minima which must be found in any society, developed or otherwise, below which it cannot go and still be entitled to be considered as a democratic society.⁵⁷

Mr. Justice Magnus concluded that Zambia was a democratic society even though it was still developing.

More recently, the Supreme Court in a majority of three to two considered the concept of what is reasonably justifiable in a democratic society with regard to freedom of assembly in the **Christine Mulundika Case**. Mulundika and seven other members of UNIP challenged the constitutionality of some provisions of the Public Order Act.⁵⁸ especially the

section which required a person wishing to hold an assembly to obtain a police permit.

The Supreme Court cited cases from other jurisdictions in search of some inspiration and fortification for its eventual judgement. Eleven cases were considered from seven countries ranging from Tanzania, Zimbabwe, Ghana, Nigeria, the USA, Europe and India.

The Supreme Court then held that "subsection 4 of section 5 of the Public Order Act contravenes Articles 20 and 21 of the Constitution and is null and void, and therefore invalid for unconstitutionality"⁵⁹ This majority decision was undoubtedly a landmark judgment supported by international democratic principles aimed at the promotion and enjoyment of fundamental human rights. Unfortunately, Parliament reacted with unprecedented speed in amending the Public Order Act. The Government wrongly perceived the judgment as a prelude to anarchy.⁶⁰

The Public Order Act was amended by Act No. 1 of 1996. These new amendments, however, are more oppressive than the previous law pertaining to assemblies in a democratic state. For example, the former subsection 4 of

section 5 of the Act which was struck down by the Supreme Court as being unconstitutional did not put a limit to the period required to make an application to the police regulating officer for a permit to hold an assembly or procession. The amendment to subsection 4 now requires a period of seven days to notify the police of the intention to hold an assembly or to conduct a procession.

Subsection 5 of Section 4 of the Act was amended to include an undertaking by the applicant that "order and peace shall be maintained through the observance" of conditions stipulated under the subsection. One of the interesting conditions is that the route and the width of the route suitable for holding of processions should be in accordance with the width and route specification for such purposes as specified by the Minister by Statutory Order⁶¹. Another condition is that the convenor of the meeting, procession or demonstration must be assured by the Police that at the time the proposed activity shall be held it will be possible for it to be adequately policed.⁶² So, if the Police say that they do not possess adequate manpower to police the proposed activity, the applicant may not proceed with their meeting, procession or demonstration. The previous subsection 5 did not contain such conditions.

The privacy of homes and private property is routinely flouted by police and other security agencies who derive their powers from an array of repressive legislation. For example, under the Emergency Powers Act,⁶³ the Preservation of Public Security Act,⁶⁴ and the Immigration and Deportation Act,⁶⁵ a person's home or property can be searched at will by police or security agencies. Search warrants are easily obtained by Police. Article 17 of the Zambian Constitution guaranteeing protection for privacy of home and other property is similar to Article 17 of the International Covenant on Civil and Political Rights (ICCPR) but the latter contains no derogations. The Zambian constitutional derogations under Article 17 are so extensive that there is little to be protected under these provisions.

(vii) Protection of Law

Article 18 lays down several rules and procedures which must be observed if any person is charged with a criminal offence. It provides for a fair trial of one charged with a criminal offence before an independent and impartial Court established by law. The provisions of this Article are

reproduced almost verbatim from the provisions of Article 9 of the International Covenant on Civil and Political Rights except for the rampant derogations which are permitted under the Zambian Constitution.⁶⁶

Some salient features of this Article are that a person is presumed innocent until proved or pleads guilty. The accused person must be given adequate time and facilities to prepare his defence. No person accused of a criminal offence is compelled to give evidence at his or her trial. He or she has a right to remain silent and the accused cannot be tried for the same criminal offence of which he or she has been convicted, acquitted or pardoned.

These principles concern the presumption of innocence, the privilege against self-incrimination and the right to remain silent. They also relate to the rule against double jeopardy, the principles of *autrefois acquit* (already tried and acquitted), *autrefois convict* (already tried and convicted) and the right to Counsel of one's choice.

Noteworthy, is the fact that these provisions of Article 18 only apply to criminal law and not to civil law and yet, under the Debtors Act of Zambia, a debtor can be detained

and imprisoned for default in payment of any debt due from such person in pursuance of any order or judgment of the court.⁶⁷

There are, in addition, many Acts of Parliament which negate the enjoyment of the right to the protection of law. Some of these Acts of Parliament prohibit the granting of **bail** to persons under custody or who are accused of certain offences which are punishable by death on conviction, such as murder and treason.⁶⁸ Added to this list are offences connected with **drugs** or **narcotics**. Under Section 43 of the Narcotic Drugs and Psychotropic Substances Act, a suspect under these offences is denied bail and remains in custody until that person's case is disposed of by the Court.⁶⁹ Similar provisions apply for offences under the State Security Act.⁷⁰ This means that should the accused be acquitted, then he or she would have been kept in prison without compensation. In theory such a person could sue the State for malicious prosecution or wrongful imprisonment but in practice the success rate is very low and not many people can afford expensive litigation.⁷¹

(viii) Freedom of Conscience

Freedom of conscience includes freedom of thought and religion. It is freedom to change one's religion or belief and freedom either alone or in community with others, both in public or private to manifest or propagate one's religion or belief in worship, teaching, practice and observance. Article 19 of the Constitution provides for the enjoyment and protection of the freedom of conscience. But it also contains derogations in the interest of defence, public safety, public order, public morality or public health. The rights and freedoms of others must be equally protected and freedom of conscience can be denied if it is reasonably justifiable in a democratic society, as was decided by the Court in the **Kachasu Case** above.⁷²

As in the case of Article 18, the right to freedom of conscience is severely curtailed by derogations fortified by Acts of Parliament. For example, the Minister of Home Affairs has absolute discretion under the Societies Act to proscribe or cancel the registration of any Society which he considers to be inimical to peace and good order of the country. The Registrar of Societies has similar powers under the same Act.⁷³

Preambular paragraph 5 of the Constitution of Zambia declares Zambia as a Christian Nation while at the same time upholding the right of every person to enjoy freedom of conscience or religion. This provision has raised some dust in that it does not place the freedom to practice other religions or beliefs on par with Christianity. In short, it is a discriminatory provision and is manifestly contrary to the provisions of Article 11(b) and 19(1) of the Constitution.

(ix) Freedom of Expression

Provision is made under Article 20 for the protection of freedom of expression. This freedom includes freedom to hold opinions without interference; to receive ideas and information without interference and freedom to import and communicate ideas without interference.

Article 20(1) provides that except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression. Article 20(2) provides that no law shall make any provision that derogates from freedom of the press. But when read with the remaining parts of Article 20, the right to freedom of expression becomes meaningless. Article 20(3)

provides that nothing contained in or under the authority of **any law** shall be held to be inconsistent with the provisions of Article 20 which provides for the protection of freedom of expression. This is a serious derogation to the provisions of Article 20(1) of the Constitution.

The meaning of "any law" was considered by Mr. Justice Musumali in the **Sara Longwe Case**. The Intercontinental Hotel had a reserved policy on the "Right of Admission" which prohibited unaccompanied women to enter certain parts of the Hotel. In this case it was the Luangwa Bar. She sued the Hotel on the ground that she was discriminated against because she was a woman. The Hotel argued, inter alia, that it had a law which justified its action under the Right of Admission Policy.

The Court found in her favour and awarded her what could only be described as contemptuous damages namely, five hundred kwacha. The Judge called it "a token amount". She was, however, also awarded costs.⁷⁴ In the context of Zambia's Bill of Rights "any law" means an Act of Parliament, a Statutory Instrument or rule of law.⁷⁵ So the Hotel's regulations did not constitute "any law".

The advent of the Third Republic has brought with it a proliferation of independent newspapers. Freedom of expression has certainly increased but derogations under "any law" have made freedom of expression illusory. For example, under Section 67 of the Penal Code, it is a criminal offence to publish false news and if convicted the publisher is liable to imprisonment for 3 years. Under Section 69 of the same Code it is a criminal offence to defame the President and if convicted, the prisoner can be incarcerated for up to 3 years. Even defamation of "foreign princes" is criminalised under section 71 of the Penal Code. Sedition which is widely defined to include virtually anything which displeases the government, carries a prison sentence of seven years on conviction.⁷⁶

The situation has been aggravated by Government control of most of the mass-media including the electronic media. For example, the Times of Zambia, the Daily Mail, the Sunday Times, the Sunday Mail, The Financial Mail and the Zambia National Broadcasting Corporation are all controlled by Government.

In recent times many cases on freedom of expression or the lack of it have gone before the courts. For example, in

another **William Banda Case**, the Plaintiff's name was always being deleted by Police whenever it appeared on his political party's application for a permit to hold a rally. He sought a declaration that his freedom of expression had been violated and the Court found that it had been so violated.⁷⁷

In the case of **Bright Mwape** and **Fred M'membe** the two editors of **The Post** were charged with the criminal offence of publishing material with intent to bring the President of the Republic into ridicule or contempt contrary to Section 69 of the Penal Code. They reported a loud whisper of one of the Government's Deputy Ministers who called the President "a twit". The accused editors petitioned the Court and prayed it to declare Section 69 unconstitutional in that the Section impeded their freedom of expression. In that case both the High Court and the Supreme Court found nothing wrong with the provisions of Section 69 of the Penal Code. The apex Court found that there was "no pervasive threat in Section 69 which endangers the freedom of expression."⁷⁸ But the Supreme Court ignored the 'pervasive' force of a possible sentence of imprisonment of up to 3 years on conviction for reporting a matter of public interest affecting a

public figure. The case was referred back to the High Court for trial where it is still pending.

(x) Freedom of Assembly and Association

This freedom is guaranteed under Article 21. It includes the right to assemble freely, associate with other persons freely and, in particular, to form or belong to any political party, trade union or other association for the protection of one's interests.

The guarantee does not escape derogations. Again, freedom of assembly and association may be limited in the interest of defence, public safety, public order, public morality or public health and if it is reasonably required for protecting the rights and freedoms of others. The right can also be denied if it is reasonably justifiable in a democratic society. The question of what is reasonably justifiable in a democratic society has already been discussed above.

The absolute discretion which the Minister of Home Affairs enjoys under the Societies Act is susceptible to abuse. Under the Act as pointed out earlier, the Minister is empowered to cancel the registration of any Society if in his

opinion its objects are, or are likely to be incompatible with the welfare and good order of Zambia.⁷⁹ And as already stated, the Registrar of Societies is similarly empowered.⁸⁰ Section 7 of the Act also empowers the Registrar to register a society or, with the approval of the Permanent Secretary, to grant exemption from registration of any society.

Over thirty political parties have been registered since the advent of the Third Republic. Most of these parties exist on paper only and freedom of assembly and association still faces the same fate as freedom of expression. Opposition parties have very little financial resources to operate effectively. On the other hand the ruling MMD has all state resources at its disposal. Parliament is completely dominated by the ruling party to the extent that the legislature is a **de facto** one party National Assembly.

Police will deny opposition political parties permission to hold peaceful assemblies at the slightest excuse available while cadres of the ruling party can assemble and demonstrate at will. Recently, a Kitwe Magistrate fined Kenneth Kaira, the UNIP Copperbelt Provincial Chairman K300,000 or six months imprisonment in default for organising what Kaira described as a peaceful demonstration in

February 1996 at the time when the Public Order Act was severely criticized by the Supreme Court. Kaira was charged under Section 74 of the Penal Code. He was accused of organising an unlawful assembly. The Police ignored the need for a peaceful demonstration or assembly in a democratic society. The Court too was not prepared to allow one of the major opposition parties to exercise its freedom of assembly and association. The case was heard by the Principal Resident Magistrate, Mr Steven Nyundo. The cause number was not known.

Several NGOs among them, Afronet, have expressed grave concern about the state of freedom of assembly for the opposition parties in the country.⁸¹ It is important to note that Zambia is a party to both international and regional human rights instruments which guarantee freedom of assembly and association.⁸²

(xi) Freedom of Movement

Freedom of movement is guaranteed under Article 22. This means the right to move freely throughout Zambia; and the right to reside in any part of Zambia, the right to leave

Zambia and return to Zambia. This right to movement includes the right to the issuance or possession of a passport. In **Cuthbert Mambwe Nyirongo**, Nyirongo's passport was seized by the Drug Enforcement Commission agents upon his arrest for possession of cannabis. The Supreme Court held that a Zambian citizen has the constitutional right to travel and to be issued with a passport unless there existed "any other law" to the contrary. In Nyirongo's case the Court found that there was no such other law which necessitated seizure and retention of his passport.⁸³

Derogations are for the purpose of lawful detention such as under a justified State of Emergency, and defence, public order or extradition. But the use of perpetual police road blocks cannot be said to be reasonably justifiable in a democratic society. It is doubtful whether there is any law which authorises road blocks.

Again, various Acts of Parliament have been put in place to justify restrictions upon the right to freedom of movement. And again, the catch phrase is that nothing contained in or done under the authority of "any law" shall be held to be inconsistent with or in contravention of this Article. Regulations promulgated under a State of Emergency give

wide powers to the President to detain anyone suspected of being a threat to public security. Similarly, provisions are contained in the Preservation of Public Security Act and other repressive legislation which the past and present Governments have stubbornly retained despite the rights and freedoms enshrined in the Zambian Bill of Rights.

(xii) Protection from Discrimination

This guarantee is contained in Article 23 of the Constitution. It is provided that no law shall make any provision which is discriminatory either in itself or in its effect. A person shall not be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

The Article defines the word "discriminatory" to mean affording different treatment to different persons attributable wholly or mainly to their race, tribe, place of origin, political opinions, colour or creed whereby persons of one such description are subject to disabilities or restrictions to which persons of another such description are not made subject or are accorded to persons of another such description.

Surprisingly, disabled persons are not included in this definition presumably, because they form a very insignificant proportion of Zambia's population. Is discrimination on the basis of disability therefore permissible?

Several derogations permit discrimination. For example, discrimination is permitted against persons who are not citizens of Zambia such as in respect of employment. Discrimination is also permitted with respect to adoption, marriage, divorce, burial, devolution of property on death or other matter of personal law in the application of customary law.⁸⁴

A close examination of the provisions of Article 23(4a-e) and 23(5)(7) shows that there are numerous other derogations apart from these mentioned above. For example, discrimination is permitted in respect of qualifications for service as a public officer or as a member of a disciplined force or for service in a local government authority or a body corporate as by law established.

Discrimination on the basis of gender is still rampant in Zambia. Women continue to be discriminated against through property laws, succession, inheritance, employment and in

many social, political and economic sectors. Even in judicial functions and judicial proceedings discrimination against women is still very common. Very often women **sureties** are not accepted by magistrates and when they do, they accept them with visible reluctance. The **Sara Longwe** type of discrimination is still common in Zambia ⁸⁵.

These wide derogations are clearly inconsistent with the international and regional human rights instruments to which Zambia is a signatory such as the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).

(xiii) Protection of Young Persons

Under Article 24 young persons are protected from exploitation in their occupation, employment, physical, mental and moral development. Young person is defined as a person under the age of fifteen years.⁸⁶ The Constitution, also protects young persons against ill treatment, neglect or being the subject of human trafficking in any form.⁸⁷ However, these protective provisions can be derogated from if there is an Act of Parliament which provides for the

employment of young persons for wages under certain conditions.⁸⁸

In Zambia, the Employment of Young Persons and Children Act is the Principal Statute that regulates the employment of young persons and children.⁸⁹ The Act defines "child" as a person under the age of fourteen years and a "Young person" as a person who has ceased to be a child and who is under the age of eighteen years.⁹⁰ Section 4 of the Act prohibits the employment of children in a public or private industrial undertaking unless the undertaking employs members of the same family. The law does not, therefore, provide protection to such children despite constitutional guarantees. The family can employ a child even under the most hazardous conditions.

Section 7 of the Act prohibits the employment of young persons under the age of 16 in an industrial undertaking unless the young person is employed under a contract of apprenticeship or if the young person's employment is authorised by a Labour Officer. The employment of young persons in any industrial undertaking at night is also prohibited unless the undertaking is a family establishment.⁹¹ The Apprenticeship Act provides, *inter alia*, for the regulation

of the employment of apprentices in various trades in order to protect the welfare of minors. The Act define "minor" as any person under the age of twenty-one years.⁹²

It will be seen that these Acts have introduced different definitions of young persons from the constitutional definition. The result is that the legal framework designed to protect young persons from being exploited exists only in name. In practice the protection is certainly illusory.⁹³

In addition to these statutes, there are a number of other enactments which provide for the protection of children and young persons. For example, the Juveniles Act provides for the custody and care of juveniles in need of care.⁹⁴ The Act defines "juvenile" as a person who has not attained the age of nineteen years. In practice, however, the exploitation of children and young persons continues unabated despite an impressive legal framework. This is so for various reasons such as poverty, illiteracy and even social attitudes toward young persons.⁹⁵