



**HUMAN RIGHTS: A COMPARATIVE STUDY OF THE CURRENT ZAMBIAN BILL
OF RIGHTS AND THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS**

BY

NOEL SIAMOONDO (26107155)

A dissertation submitted to the University of Zambia Law Faculty in partial fulfilment
of the requirement for the award of the Degree of Bachelor of Laws (L.L.B.)

UNZA

APRIL 2010

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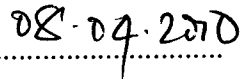
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ABSTRACT

In the year 1987, Zambia ratified the African Charter on Human and People's Rights. The implication of such an undertaking is that it places a mandate on Zambia to honour the international obligations contained in this instrument as failure to do so would defeat the whole purpose of treaty ratification. This paper undertakes to compare the provisions of the current Zambian bill of rights to those of the African Charter. It must be mentioned that the documents under consideration are different in that while the Zambian bill of rights is a national law, applying only in one country, the African Charter is a regional instrument applying to countries signatory to it. It thus becomes a difficult task to find exact similarities in the formulation of the rights. Therefore, it will be necessary to draw implications from interpretation of various provisions where important points have not been explicitly made. It will do this by comparing the jurisprudence of the African commission on Human and People's Right to that of the Zambian Courts in terms of interpretation of the rights. The enforcement mechanisms of these rights provided for under both documents will also be examined. It will then become necessary to evaluate the protocol establishing the African Court for Human and People's Rights and how this special court will relate with the African Commission. The paper will conclude by giving a summary of the findings of each chapter and it shall recommend the domestication of the African Charter; abolition of the death penalty in Zambia or restrict the imposition of such a penalty to the most serious crimes; and finally, the enactment of a Freedom of Information Act.

DEDICATION

To my parents, Mr and Mrs Siamoondo for being the pillar of my strength.

My brother and sisters, Brian, Leah, Mukwiti and Jessy.

ACKNOWLEDGEMENTS

I thank God Almighty for the many blessings he has bestowed upon me.

The preparation of this work owes much to a number of people without whose support and encouragement would not have made this work possible.

Special gratitude goes to my supervisor Mr. Palan Mulonda for critically analysing every chapter of my work, despite his busy schedule. His guidance and support in terms of materials is beyond comparison. Thank you Sir.

Special thanks go to my friends Timothy, Mutule, Nsama, Misozi, Theresa, Mambo, Kalunga, Kate and Mr Nsamfwe for always reminding me to work hard, and for the support you gave me throughout this work. Gratitude also goes to all those i have not mentioned by name but made my research less difficult.

To my family the Siamoondos, i cannot thank you enough for the faith you have shown in me. Indeed family is God's way of taking care of us. To my late Grandfather, Patrick Chiwota, i know you are smiling at me with pride.

I would also like to express my sincere gratitude to all my lecturers who have contributed to my academic achievements. The Dean of Law School, Dr Munalula, i can only say you became dean at the right time as your emphasis on hard work kept lingering in my mind. Thank you.

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Resident Doctors Association of Zambia v Attorney General (2003) Z.R. 88

Wise v Attorney-General (1991) Z.R. 124

LIST OF ABBREVIATIONS

Abbreviation	Full Title
ACHPR.....	African Charter on Human and People’s Rights
AHRLR	African Human Rights Law Reports
ECHR.....	European Court of Human Rights
ICCPR.....	International Covenant on Civil and Political Rights
NCC.....	National Constitutional Conference
UDHR.....	Universal Declaration of Human Rights

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CHAPTER ONE

Human Rights: A Comparative Study of the Current Zambian Bill of Rights and the African Charter on Human and People's Rights

1.0 GENERAL INTRODUCTION

Politically and constitutionally, Zambia achieved a first in 1964 by becoming the first country in Anglophone Sub-Sahara Africa, to attain independence as a Republic within the British Commonwealth. Since then, the country has undergone four major constitutional changes. It is currently embroiled in yet another attempt at constitutional reform.¹ Zambia Ratified the African Charter on Human and Peoples' Rights (also known as the Banjul Charter) in 1987. Thus, this places a mandate on Zambia to honour the international obligations contained in this instrument as failure to do so would defeat the whole purpose of treaty ratification. The above argument can be supported by the decision of the Commission² to the effect that to allow national law to take precedence over international law of the African Charter would defeat the purpose of the rights enshrined in the African Charter. International human rights standards must always prevail over contradictory national law. As a 'dualist' state; Zambia is required to enact legislation to give full effect to the African Charter. In line with the Commission's Jurisprudence, the lack of domestication constitutes a violation of Article 1 of the African Charter. Thus, the Centre for Human Rights³ called upon the Commission to recommend that Zambia fully domesticated the

¹L. M. Mbao, 'Draft paper presented at African Network of Constitutional Law conference on Fostering Constitutionalism in Africa Nairobi April 2007' *The Politics of Constitution – Making in Zambia: Where does the Constituent Power Lie?* P. 1

² Media Rights Agenda and Others v. Nigeria (2000) AHRLR 2000 (ACHPR 1998): Para 66-68

³ Shadow Report on Zambia's Initial State Report to the African Commission on Human and Peoples' Rights Submitted by the Centre for human Rights, University of Pretoria May 2007.

African Charter- in particular by enacting as justiciable guarantees the socio-economic rights that are included in the African Charter. This research is thus written with the objective of analysing the Zambian bill of rights in light of the provisions of the African Charter on Human and Peoples' Rights.

1.1 STATEMENT OF PROBLEM

This study will basically concern itself with undertaking a comparative study of the Zambian bill of rights and the African Charter. Having the provisions of the African Charter in mind will aid to a large extent in interpreting the rights guaranteed and protected under the Zambian bill of rights. It will also be revealed that there are certain pieces of ordinary legislation which tend to limit some of the rights guaranteed under the Zambian constitution and the African Charter. One such piece is the Public Order Act which violates the provisions of the Charter on freedom of movement and assembly.⁴ One issue which has also become topical in the recent years within the realm of human rights is that of sexual minorities. The Penal Code⁵ of Zambia outlaws sexual relations between people of the same sex. The African Charter outlaws discrimination on the basis of an open-ended number of factors. The right to equal treatment of sexual minorities should also be respected.⁶ However, it be emphasised that while there is the desire to protect and guarantee an individual's right to choose who they engage with sexually, there is need to uphold the law. Therefore, this penal provision will be examined in the context of Article 27 (2) of the Charter which acts as a derogation clause. This clause takes into account the rights of others, collective security, morality and common interest. The NCC has recently adopted a clause in the Draft Constitution prohibiting same sex marriages. The consistency of such a clause with the

⁴ *ibid*

⁵ Cap 87 of the Laws of Zambia under section 158.

⁶ Shadow Report

African Charter will be considered from the context of Article 27 of the International Covenant on Civil and Political Rights which prohibits discrimination on the basis of sex or other status and Article 17 which deals with privacy of an individual. Regard is being had to the ICCPR due to the fact that the jurisdiction of the African Commission is also extended to the interpretation and application of the African Charter and any other international human rights instruments ratified by the states concerned⁷. Furthermore, the African Commission did not have the opportunity to decide on a matter brought before it regarding sexual minorities. A communication was brought concerning the legal status of homosexuals in Zimbabwe, however, the communication was withdrawn by the author and the Commission saw no need to continue with it.⁸

1.2 OBJECTIVE OF STUDY

The main purpose of this study is to examine the current Zambian bill of rights in the light of the provisions of the African Charter. Both documents centre on what are known as basic or fundamental rights of the individual.⁹ The difference between the two is twofold. First, while the Zambian bill of rights is a national law, applying only in one country, the African Charter is a regional instrument applying to countries signatory to it. The latter is therefore general and has a wider application. Second, the African Charter came into force on 21st October, 1986, whereas the current Zambian Constitution came into force in 1991 and was amended in 1996. Another feature worth noting is that while the Zambian bill of rights restricts itself on basic rights and freedoms, the African Charter goes a step further by including what are termed as peoples'

⁷ Article 60 of the African Charter on Human and People's Rights. Also Article 7 of the Protocol of the Court. Zambia is a state party to the ICCPR

⁸ *Courson v Zimbabwe* (2000) AHRLR 335 (ACHPR 1995)

⁹ C. M. Peter, *Human Rights in Africa: A Comparative Study of the African Charter and the New Tanzanian Bill of Rights*. (London: Greenwood Press, 1990) P. 1

rights. These are rights an individual can only enjoy in a collective sense as a member of a community.

Specific objectives of the study will be to:

- (a) Explain the evolution of the Zambian bill of rights and the origins of the African Charter;
- (b) Discuss the concept of peoples' rights and why these rights are a growing concern
- (c) Analyse the provisions of the Zambian bill of rights in light of the provisions of the African Charter;
- (d) Analyse and examine the bill of rights under the Mung'omba Draft Constitution in light of the African Charter provisions.

1.3 RESEARCH QUESTIONS

- 1. Does the Zambian Bill of Rights conform to the African Charter standards to which Zambia is a state party?
- 2. How will the newly established African Court relate with the African Commission?

1.4 SIGNIFICANCE OF STUDY

The significance of this study is that human rights have been accorded international primacy; it is the duty of states parties to particular conventions to give effect to the rights enshrined thereunder. For instance, Article 4 of the Charter guarantees the right to life. There were 220 prisoners on death row, one of whom is a woman, Joyce Kasongo. She was sentenced to death by the Ndola High Court and is held in isolated confinement in Mukobeko Maximum Prison in Kabwe. In another case, Mabvuto Jere, aged 27, was sentenced to death for stealing a bicycle.

The death sentence is mandatory in Zambia for armed robbery and he had threatened to assault the owner of the bicycle. On 23 February 2007, the government stated that it intends to retain the death penalty.¹⁰ The Centre for Human Rights¹¹ urged government to abolish the death penalty in *toto*, or, at the very least, to limit the imposition of the death penalty to only the most serious crimes, in line with the Commission’s ‘Resolution urging the States to Envisage a Moratorium on the Death Penalty’ (1999). These will be taken into account when the paper looks at the right to life and how the Commission has interpreted this right.

1.5 METHODOLOGY

The major method of data collection to be deployed will be desk research. Where necessary, this will be supplemented by interviews with various personnel in sectors tasked with human rights related matters. The data for this research will be sourced from books, the internet, journal articles, paper presentations, student obligatory essays, reports by mandated bodies and, in a few and necessary cases, newspaper articles.

1.6 DEFINITION OF KEY CONCEPTS

To begin with a bill of rights, this can be said to be a list of the rights that are considered important and essential by a nation. The purpose of these bills is to protect those rights against infringement by the government. The term “bill of rights” originates from Great Britain, where it referred to a bill that was passed by the Parliament in 1689. An entrenched bill of rights exists as a separate instrument that falls outside the normal jurisdiction of a country’s legislative body. An unentrenched bill of rights exists as a separate Act that is presented by a legislative body. As

¹⁰ See Zambia: *Death penalty will stay on statute books* – Minister; AllAfrica.com, 24/02/2007

¹¹ Shadow Report

such, it can be changed or repealed by the body that created it. It is not as permanent as a constitutional bill of rights.¹²

The African Charter on Human and People's Rights (also known as the Banjul Charter) is an international human rights instrument that purports to promote and protect human rights and basic freedoms on the African continent.¹³

It emerged under the aegis of the Organisation of African Unity (since replaced by the African Union) which, at its 1979 Assembly of Heads of State and Government, adopted a resolution calling for the creation of a committee of experts to draft a continent-wide human rights instrument, similar to those that already existed in Europe (European Convention on Human Rights) and the Americas (American Convention on Human Rights). This committee was duly set up, and it produced a draft that was unanimously approved at the OAU's 1981 Assembly.¹⁴

The traditional conception of human rights is that they are rights one has simply because one is a human being. It identifies human rights as the rights in the strict and strong sense of the term and it establishes that they are held simply by virtue of being human.¹⁵ The Human rights Covenants note that human rights “derive from the inherent dignity of the human person.” Professor Anyangwe adds, that human rights are “rights inherent in mankind's nature and without them, mankind cannot live like human beings; they are the foundations of existence and co-existence.”¹⁶

¹² I. Brownlie, *Basic Documents on Human Rights* (Oxford: Clarendon, 1981) pp. 418-21

¹³ *ibid*

¹⁴ *ibid*

¹⁵ J. Donnelly, *International Handbook on Human Rights*. (New York :Greenwood Press, 1987) p1

¹⁶ C. Anyangwe, *Introduction to Human Rights and International Humanitarian Law*. (Lusaka: UNZA Press, 2004) p1

Thus, one might add that human rights are rights inherent to all human beings whatever the nationality, place of residence, sex, national or ethnic origin, colour, religion, language or any other status. All are entitled to human rights without discrimination.¹⁷

These rights are all interrelated, interdependent and indivisible. Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law.

(a) Universal and Inalienable

The principle of universality of human rights is the cornerstone of international human rights law. This principle as first emphasised in the Universal Declaration on Human Rights in 1948 has been reiterated in numerous international human rights conventions, and resolutions. The 1993 Vienna World Conference, for example noted that it is the duty of states to promote and protect all human rights and fundamental freedoms regardless of their political, economic and cultural systems.¹⁸

Human rights are inalienable. They should not be taken away, except in specific situations and according to due process. For example, the right to liberty may be restricted if a person is found guilty by a court of law.

(b) Interdependent and Indivisible

All human rights are indivisible whether they are civil and political rights such as the right to life, equality before the law and freedom of expression; economic, social and cultural rights such

¹⁷ www.ohchr.org/En/Issues

¹⁸ *ibid*

as the rights to work, social security and education or collective rights such as the rights to development and self-determination are indivisible, interdependent and interrelated. The improvement of one right facilitates advancement of the others. Likewise, deprivation of one right adversely affects the others.¹⁹

(c) Equality and non-discrimination

Non-discrimination is a cross-cutting principle in international human rights law. This principle is present in all the major human rights treaties and provides the central theme of some of international human rights conventions such as the International Convention on the Elimination of all Forms of Racial Discrimination (CERD).²⁰

The principle applies to everyone and in relation to all human rights and freedoms and it prohibits discrimination on a list of non-exhaustive categories such as sex, race, colour and so on. The principle of non-discrimination is complemented by the principle of equality as stated in Article 1 of the UDHR: “All human beings are born free and equal in dignity and rights.”²¹

(d) Both Rights and Obligations

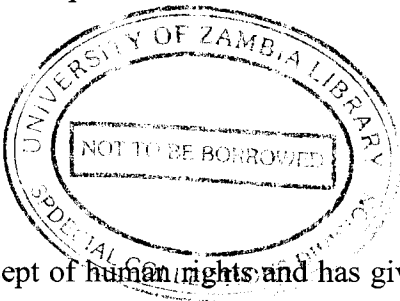
Human rights entail both rights and obligations. States assume obligations and duties under international law to respect, to protect and to fulfil human rights. The obligation to respect means that states must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires states to protect individuals and groups against human rights

¹⁹ *ibid*

²⁰ *ibid*

²¹ *ibid*

abuses. The obligation to fulfil means that states must take positive action to facilitate the enjoyment of basic human rights.²²



1.7 CONCLUSION

In a nutshell, this chapter endeavoured to explain the concept of human rights and has given its characteristics. Having looked at the above definitions and explanations as to why this research is being undertaken, it is the view of the author that the next Chapter proceeds to give a historical background of both the Zambian bill of rights and the African Charter on Human and People’s Rights.

²² *ibid*

Chapter Two

The Zambian Bill of Rights and the African Charter on Human and People's Rights: A Historical Background.

2.0 INTRODUCTION

The Republic of Zambia, formerly the British Protectorate of Northern Rhodesia, became an independent state on 24 October 1964.²³ From 1964 until November 1991, Zambia was governed by the United National Independence Party, the principal party in the struggle for independence, under the leadership of President Kenneth Kaunda.

The independence constitution provided for a multiparty democracy with an executive President. That constitution was amended in 1969 following a national referendum 'to end all referenda'.²⁴ It was finally repealed and replaced by a new constitution in 1973, ushering in what was popularly known as the 'one-party participatory democracy' or a one-party state.²⁵ In 1990, the deteriorating economic situation and increasingly vocal opposition to his government finally forced President Kaunda to concede to demands for the restoration of a multi-party system. A transitional constitution was unveiled, repealing the 1973 constitution and facilitating a return to

²³Zambia Independence Act, 1964, 13 and 14 Eliz 11. c65; Zambia Independence Order-In-Council, 1964.

²⁴Constitution of Zambia (Amendment) Act 3 of 1969.

²⁵Constitution of Zambia, Amendment Act 5 of 1972, and Act 27 of 1973.

multi-party democracy.²⁶ That constitution was radically amended in 1996. As if that was not enough, another constitutional reform project was initiated in 2003.²⁷

2.1 Background to the Zambian Bill of Rights

As the colonies were nearing independence in the 1950's and 1960's, the issue of a bill of rights abruptly rose in importance on every agenda. It was given a special place, particularly in negotiations for independence between the colonial powers and the nationalists. By 1973 about 32 of the former British colonies had a bill of rights in their constitutions.²⁸

2.1.1 Protection of Human Rights during the Federation

Up until 1963 self-governing constitution, there was no bill of rights in Zambia (or Northern Rhodesia as it was called). The only logical argument which can be advanced for this state of affairs is that colonialism thrived on the suppression of natives and their denial of fundamental rights. However, there were a number of provisions under the federal constitution by which certain fundamental rights of the citizens, primarily natives were protected. Foremost of these was a provision in the Federal Constitution providing for the establishment of a standing committee in the federal Assembly called the African Affairs Board.²⁹

This committee was created in order to check the passing of legislation which might be considered unfairly discriminatory against natives. In addition, the Federal Constitution under

²⁶ Constitution of Zambia (Amendment) Act 1991 assented to on 24 August 1991.

²⁷ The Mun'gomba Constitutional Review Commission was appointed in 2003 vide statutory instrument 40 of 2003, as amended by statutory instruments 42 of 2003, 86 of 2003, 98 of 2003, 134 of 2003 and 56 of 2004. An Interim Report was submitted in June 2005 and a final one in December 2005.

²⁸ J. S. Read, "*Bill of Rights in the Third World, Some Commonwealth Experiences*," *Verfassung und Recht in Ubersee* 6 (1973), p. 21.

²⁹ Article 70

Article 99 empowered the Government of the United Kingdom to reserve and disallow any legislation which it considered objectionable. The federal constitution also contained a provision under Article 33(2), which protected the land rights of the Barotse people.

2.1.2 The 1963 Self-Governing Constitutional Bill of Rights

Events leading to the incorporation of a bill of rights in the 1963 constitution began with the announcement in the House of Commons by the British Prime Minister of the appointment of an advisory commission “...to advise governments in preparation for the 1960 review on the constitution and framework best suited in the Federal Constitution of 1963 including the preamble.”³⁰ Foremost of these objectives was the need ‘for the co-existence and partnership of the races.’³¹

The Commission appointed commonly referred to as the Monkton Commission recommended the introduction of a bill of rights in the Federal Constitution. Thus it reported “we have come to the conclusion that in the interests of the greater security, a Bill of Rights ought to be included in the Constitution of the federation.”³²

The Commission further recommended that such a bill of rights should be drawn “...in accordance with the traditions of the English-Speaking world and the current practice in the multi-racial Commonwealth.”³³

³⁰ Hansard 21st July, Col 1072.

³¹ 1953 Federal Constitution Preamble

³² Monkton Commission Report

³³ Monkton Report Cmnd 1165

However, the recommendations of this Report were not immediately implemented and it was only in 1963 that a bill of rights was finally introduced and this was in the Self-Governing Constitution. This Bill of Rights was modelled on the Nigerian Constitution of 1963 which in turn was based on the European Convention for the Protection of Human and People's Rights 1950. The European Convention like all other treaties was created under the auspices of the United Nations Charter. It was essentially aimed at ensuring that the European governments signatory to it safeguarded the fundamental rights and freedoms of their citizens.³⁴

Therefore, one might add that it is probable that this tradition of using human rights essentially as safeguards against state power would pervade all jurisdictions whose bills of rights have been modelled on this Convention, Zambia inclusive.

2.1.3 The First Republic, 1964 – 1972

In 1968, Kaunda was re-elected unopposed as President. The first major constitutional reform ensued in the following year when the independence constitution was amended to remove entrenched clauses. Certain provisions of the Bill of Rights including sections guaranteeing the independence of the judiciary and the constitution's amendment procedure were specially entrenched.³⁵

On 17 June 1969, in an overwhelming 'Yes' vote (85.02%), Kenneth Kaunda's government obtained the necessary support to amend the Constitution so as to expunge the referendum

³⁴ G. Ezejirofor, *Protection of Human Rights under the Law*. (London: Butterworth 1964) p.5

³⁵ See the third schedule to the Zambia Independence Order-In-Council, 1964, section 72 of the independence constitution contained the constituent power to alter the constitution.

clause.³⁶ The indisputable outcome was that the Zambian legislature was now given power to amend the constitution, with a two-thirds majority using the ordinary legislative process prescribed in the 1972 constitution, without reference to a referendum. Thus the Constitution of Zambia (Amendment) Act, 3 of 1969, made the constitution more flexible and in turn granted more power to the legislature. It was under this 'simplified' procedure that the independence constitution was repealed and replaced by a one-party state constitution in 1973.³⁷

2.1.4 One Party Participatory Democracy, 1973 – 1991

The nation's founding President, Kenneth Kaunda, and his government initiated fundamental changes in the philosophy and system of government in 1972. On 25 February 1972, Kaunda informed the nation, in a major press conference that he was going to appoint a Commission of Inquiry to consider, *inter alia*, changes to the country's constitution and to the fundamental structure of government so as to accommodate the proposed one-party system of government.³⁸

In discharging this mandate, the Commissioners were enjoined to pay due regard and adhere to certain principles, including -

- (a) the maintenance of the supremacy of the rule of law and independence of the judiciary;
- (b) the protection of fundamental rights and freedoms of the individual;
- (c) the vesting of supreme power in the people to be exercised directly where possible and indirectly through democratic, representative institutions;

³⁷ Constitution of Zambia (Amendment) Act 3 of 1969

³⁸ The Presidential announcement was made on 25 February 1972. See the *Times of Zambia* 26 February 1972. The Commission was appointed, formally, on 1 March 1972. See Statutory Instrument 46 of 1972.

- (d) the need for a strong and purposeful government and a united nation in order to achieve its revolution; and
- (e) the position of Zambia as part of a continent – wide movement for independence and for the liquidation of imperialism, colonialism, racism and foreign exploitation.

It is instructive to note that the government's decision to appoint the Chona Commission as well as its terms of reference were unsuccessfully challenged in the landmark case of *Nkumbula v The Attorney-General*.³⁹ Nkumbula, the leader of the opposition party in the National Assembly, the African National Congress, challenged the move towards the one-party system of government, averring that his basic human rights and fundamental freedoms, in particular his freedoms of assembly and association, guaranteed in the independence constitution, would be infringed by the proposed constitutional changes. The High Court and the then Court of Appeal were unanimous in rejecting Nkumbula's case, holding that his freedoms had in fact not been abridged at the material time since no executive or administrative action had been taken *in relation to him*. The Court of Appeal, quite rightly, observed that it had no power to prevent or question the validity of a Bill, much less a Bill seeking to amend the constitution before it became law even if it was aimed at removing basic human rights and fundamental freedoms.⁴⁰

Free political activity was severely curtailed; UNIP became the sole political factor in the country. Section 4 (1) of the Constitution of Zambia Act 27 of 1973, proclaimed that 'there shall be one and only one political party or organization in Zambia, namely the United National

³⁹(1972) Z.R. 204; See also the Court of Appeal Judgment No 6 of 1972.

⁴⁰L. M. Mbao, 'Draft paper presented at African Network of Constitutional Law conference on Fostering Constitutionalism in Africa Nairobi April 2007' *The Politics of Constitution – Making in Zambia: Where does the Constituent Power Lie?* P. 6

Independence Party'. The Constitution went further to centralize and monopolise political power in the hands of UNIP, stating;

Nothing contained in the Constitution shall be so construed as to entitle any person lawfully to form or attempt to form any political party or organization other than the Party or to belong to, assemble or associate with, or express opinion or do any other thing in sympathy with, such political party or organisation.⁴¹

2.1.5 Reversion to Multi-Party Democracy

In November 1990, President Kaunda appointed a Constitutional Review Commission under the Chairmanship of the respected lawyer and academic, Professor Patrick Mvunga, to enquire, determine and recommend a system of political pluralism that would ensure the separation of the powers of the legislature, the executive and the judiciary so as to enhance the role of these organs and to look into the composition and functions of the various organs of the state and recommend modalities of their operation.⁴² Shortly thereafter Kaunda reached a compromise agreement with the nascent opposition and a constitutional amendment was passed, expunging Article 4 from the Constitution and thus paving the way for the formation of political parties.⁴³

On 28 May 1996, President Chiluba assented to the amendment and the Constitution of Zambia (Amendment) Bill 18 of 1996 became law.⁴⁴

The Amendment Act introduced three key changes:

⁴¹Section 4(2) Constitution of Zambia Act 27 of 1973

⁴²The Mvunga Commission was appointed on 30 November 1990

⁴³Mwanakatwe

⁴⁴It is now cited as the Constitution of Zambia (Amendment) Act 18 of 1996.

First, it revised the Preamble to the Constitution so as to provide for the declaration of Zambia as a Christian nation. Secondly it added provisions relating to qualifications for presidential candidates based on origin or birth of the candidate's parents. This radical amendment was contained in Article 34 (3). Thirdly, it provided that no person who had twice been elected president should be eligible for election to that post.

2.2. Historical Development of the African Charter on Human and Peoples' Rights

The adoption of the African Charter on Human and People's Rights at the 18th Ordinary Assembly of Heads of state and Government of the Organisation of African Unity in Nairobi, Kenya, in June 1981 was an epoch-making event. For many Africans independence had created high expectations, especially regarding the restoration of human dignity, which had totally been violated during the colonial era. However, violations of the individual's fundamental rights continued unabated.⁴⁵

In independent Africa, human rights issues were complicated by two major problems. First, while during the colonial period violations of rights of colonised people was seen and treated as a matter of international concern, it was different in independent Africa. This time, human rights violations were reduced to a national affair and often kept from the eye of the international community. A second problem was created by the O.A.U Charter, newly adopted by the first leaders of independent Africa in Addis Ababa, Ethiopia, in May 1983, Article 3(ii) of this Charter provides in clear terms that member states, in pursuit of the purposes of the Organisation, must adhere to, among other things, the principle of non-interference in the

⁴⁵ C. M. Peter, P. 1

internal affairs of other states.⁴⁶ This seemingly innocent Article, aimed at protecting newly won sovereignty, became a subject of abuse over time. States would mishandle, torture, and even butcher their own citizens with the rest of Africa watching.

In this context, the adoption of the African Charter on Human and People's Rights may be seen as a blow to certain regimes in Africa, namely those which had taken the non-interference clause as a licence to violate human rights of its citizens.

There had been attempts before the adoption of the African Charter to address the issue of human rights in Africa. The first conference of independent African states was held at Accra, Ghana, April 15-22, 1958. At that time, few African states were independent. Nonetheless, the meeting was held and among other things, discussed the issue of human rights in Africa in both the Declaration and Resolution; the conference affirmed the resolute adherence by African states to the principles enunciated at the Bandung Conference of Non-Aligned States, which included respect for fundamental human rights.⁴⁷

Two years later, the second Conference of Independent African States convened at Addis Ababa, June 15-19, 1960. The number of independent states in Africa was gradually increasing and human rights were gaining importance, especially in those territories still under foreign rule. This conference went on to characterise the subjugation of people to alien domination and

⁴⁶ *ibid*

⁴⁷ I. Brownlie, *Basic Documents on Human Rights* (Oxford: Clarendon, 1981) pp. 418-21

internal affairs of other states.⁴⁶ This seemingly innocent Article, aimed at protecting newly won sovereignty, became a subject of abuse over time. States would mishandle, torture, and even butcher their own citizens with the rest of Africa watching.

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⁴⁶ *ibid*

⁴⁷ I. Brownlie, *Basic Documents on Human Rights* (Oxford: Clarendon, 1981) pp. 418-21

exploitation as a denial of fundamental rights, which was contrary to both the Charter of the United Nations and the Universal Declaration of Human Rights.⁴⁸

Another major conference in this early period was the Lagos Conference on Rule of Law in January 1951. This conference was organised and sponsored by the International Commission of Jurists. In its resolution, the conference proposed *inter alia* that personal liberty should be entrenched in the constitutions of all countries and that such personal liberties should not in peacetime be restricted without trial in a court of law.⁴⁹ It was also suggested that in order to give effect to the Universal Declaration of Human Rights, African Governments should study the possibility of adopting an African Convention on Human Rights.⁵⁰

The genesis of the current A.U Charter began with the joint Senegal-Gambia resolution tabled at the Monrovia, Liberia, Summit meeting of the O.A.U in July 1979. The resolution that was passed by the summit called for experts to draft an African Charter. The main objective was to prepare a truly African convention on human rights based on an African Philosophy, and an instrument that would be responsive to African needs.⁵¹

The O.A.U ministers of justice and legal experts met Banjul, the Gambia, in June, 1980, to consider the draft charter. In this ministerial meeting, eleven Articles were completed. The

⁴⁸ *ibid*

⁴⁹ *ibid*

⁵⁰ *ibid*

⁵¹ *Ibid*

ministers met again in the same city to finalise the work of the charter. The final draft had 68 Articles.⁵²

According to Article 63(2) of the charter, it would enter into force after ratification by a simple majority of the O.A.U member states. The Banjul Charter came into force on October 21, 1986. Zambia Ratified the African Charter on Human and Peoples' Rights in 1987.

2.3 CONCLUSION

In conclusion, it can be said that the Zambian bill of rights has undergone some major transformation since its incorporation. These changes range from it been entrenched to being unentrenched, to restricting freedom of association as a result of the introduction of one party state rule to the return of multi-partism which once again guaranteed the right to free association. The African Charter on the other hand came into being as a result of series of conferences held around the African continent where it was felt that there was need to have a human rights document which would reflect the African ideology of human rights. The next chapter will thus concentrate on comparing the substantive rights under the Zambian bill of rights to those under the African Charter.

⁵² O.A.U Document AHG0115 (XVI) of the Monrovia summit meeting held in July 1979.

Chapter Three

The Zambian Bill of Rights and the Banjul Charter on Human and People's Rights: A Comparison

3.0 INTRODUCTION

As earlier explained, these two documents are different in terms of authorship and also as far as the audiences are concerned. Both documents centre on what are known as basic or fundamental rights of the individual.⁵³ However, worth noting is that while the Zambian bill of rights restricts itself on basic rights and freedoms, the African Charter goes a step further by including what are termed as peoples' rights. These differences make it almost impossible to find similarities in the formulation of rights, freedoms, and duties. Therefore, it will be necessary to draw implications from interpretation of various provisions where important points have not been explicitly made.⁵⁴

3.1 Rights and Freedoms

The rights and freedoms which were entrenched under the Zambian Constitution, and indeed under most other commonwealth African Constitutions, were those in the nature of "fundamental rights", trace their immediate origin from the European Convention-but which in fact have a long history enmeshed in the Western politico-philosophical traditions. Like the European Convention, these rights are formulated with a great deal of specificity as they were meant to be susceptible to judicial enforceability.⁵⁵

⁵³ C. M. Peter P. 1

⁵⁴ *ibid*

⁵⁵ L.S Zimba *The Zambian Bill of Rights: An historical and Comparative Study of Human Rights in Commonwealth Africa* (Nairobi: East African Publishing House 1984) p 93

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⁵³C. M. Peter P. 1

⁵⁴ ibid

⁵⁵ L.S Zimba *The Zambian Bill of Rights: An historical and Comparative Study of Human Rights in Commonwealth Africa* (Nairobi: East African Publishing House 1984) p 93

There are in all twelve rights and freedoms which are protected under the Zambian bill of rights, and these are: the right to life;⁵⁶ the right to personal liberty;⁵⁷ freedom from slavery and forced labour;⁵⁸ freedom from inhuman treatment;⁵⁹ the right to property and freedom from its deprivation;⁶⁰ the right to privacy of home and other property;⁶¹ the right to protection of the law;⁶² freedom of conscience which includes freedom of thought and of religion etc.;⁶³ freedom of expression⁶⁴; freedom of assembly and association;⁶⁵ freedom of movement⁶⁶; and freedom from discrimination on the grounds of race, tribe, colour, etc.⁶⁷

All these rights are, of course, subject to exceptions which are carefully detailed in the sub-articles that in all cases immediately follow the substantive provisions guaranteeing the right or freedom concerned. The reason for this is, no doubt, that it is impossible to provide rights in a constitution in absolute terms.⁶⁸

3.2 Right to Life

The right to life is the fulcrum of all other rights. It is the fountain through which other rights flow, and any violation of this right without the due process amounts to arbitrary deprivation of life.⁶⁹ The right to life has two main parts. First, it refers to the right of the protection of the

⁵⁶ Article 12

⁵⁷ Article 13

⁵⁸ Article 14

⁵⁹ Article 15

⁶⁰ Article 16

⁶¹ Article 17

⁶² Article 18

⁶³ Article 19

⁶⁴ Article 20

⁶⁵ Article 21

⁶⁶ Article 22

⁶⁷ Article 23

⁶⁸ *Zimba 99*

⁶⁹ *Forum of Conscience v Sierra-Leon* (2000) AHRLR 293 (ACHPR 2000)

physical body against external aggression which threatens to extinguish life itself. Second, it is the protection of life through the nourishment of the body. Both the Zambian bill of Rights and the African Charter refer to this very important right.⁷⁰ According to Article 12 of the Zambian Constitution, a person shall not be deprived of his life intentionally except 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.

However, the Article goes on to provide for instances when the right to life cannot be said to have been arbitrarily deprived. These are to be found under Article 12 (3).

According to the Banjul Charter, the right to life can be ensured through inviolability of the person and respect of the dignity, liberty, and security of the person.⁷¹ In *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*⁷² the African Commission stated that the protection of the right to life in Article 4 also includes a duty for the state not to purposefully let a person die while in its custody. Similarly, in *Malawi African Association and Others v Mauritania*⁷³ the African Commission stated that denying people food and medical attention, burning them in sand and subjecting them to torture to the point of death, point to a shocking lack of respect for life, and constitutes a violation of Article 4. Further, in *Animu v Nigeria*⁷⁴ the Commission noted that it would be a narrow interpretation of the right to life to think that it can only be violated when one is deprived of it. It cannot be said that the right to respect for one's life and the dignity of

⁷⁰ Article 12 of the Zambian Constitution and Article 4, 5 and 6 of the Banjul Charter

⁷¹ Article 4 of the Charter

⁷² (2000) AHRLR 212 (ACHPR 1998)

⁷³ (2000) AHRLR 149 (ACHPR 2000)

⁷⁴ (2000) AHRLR 258 (ACHPR 2000)

one's person, which this Article guarantees, would be protected in a state of constant fear and/or threats.

As regards the death penalty in Zambia, there are presently 220 prisoners on death row, one of whom is a woman, Joyce Kasongo. She was sentenced to death by the Ndola High Court and is held in isolated confinement in Mukobeko Maximum Prison in Kabwe. In another case, Mabvuto Jere, aged 27, was sentenced to death for stealing a bicycle. The death sentence is mandatory in Zambia for armed robbery and he had threatened to assault the owner of the bicycle. On 23 February 2007, the government stated that it intends to retain the death penalty.⁷⁵ "The government was urged to abolish the death penalty in toto, or, at the very least, to limit the imposition of the death penalty to only the most serious crimes, in line with the Commission's 'Resolution urging the States to Envisage a Moratorium on the Death Penalty' (1999)."⁷⁶

3.3 Protection of Right to Personal Liberty

A person shall not be deprived of his personal liberty except as may be authorised by law...⁷⁷ while the Zambian bill of rights goes on to list a number of exceptions to this right, the African Charter merely provides in Article 6 that: every individual shall have the right to liberty and to the security of his person. However, from its wording, it can be stated that this Article also recognises that this right may be deprived if due process of the law is followed. What is prohibited is arbitrary arrest or detention. One way in which this right can be said to be deprived is through 'detention without trial laws'.

⁷⁵Zambia: *Death penalty will stay on statute books* – Minister; AllAfrica.com, 24/02/2007

⁷⁶ Shadow Report

⁷⁷ Article 13 of the Constitution

The state has the right and duty to employ its best efforts to protect society against those who threaten its security.⁷⁸ Preventive detention or detention without trial is therefore, used by the executive to hold a person on suspicion of being a potential threat to State security.⁷⁹ The detaining authority may simply believe that the person concerned, if not detained, is likely to engage in activities prejudicial to public security.⁸⁰

However, it must be noted that detention should not continue beyond the period for which the state can provide appropriate justification.⁸¹ In *Mukong v Cameroon*⁸² it was held that “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of the law... this means that remand in custody pursuant to lawful arrest must not only be *lawful but reasonable in all the circumstances*.

3.4 Protection from inhuman treatment

Where as the Zambian bill of rights has a separate Article to deal with protection from inhuman treatment⁸³, and another Article to deal with protection from slavery and forced labour⁸⁴, the African Charter seems to provide for the right to the respect of the dignity inherent in a human being with the freedom from all forms of exploitation particularly slavery, slave trade, cruel inhuman or degrading punishment under one Article.⁸⁵ Nonetheless, one striking feature is that

⁷⁸ J. Hatchard, *Individual Freedoms and State Security in the African Context: The case of Zimbabwe*. (Ohio: At the University Press, 1993) 46

⁷⁹ *ibid*

⁸⁰ *Re Kapwepwe and Kaenga* (1972) Z.R. 248

⁸¹ *A v Australia* (1998) 5 I.H.R.R. 78

⁸² (1995) 2 I.H.R.R. 131.

⁸³ Article 15

⁸⁴ Article 14

⁸⁵ Article 5

under both documents, there is no provision that a law may be in place to derogate from these rights, in other words, these are non-derogable rights as they touch on the core of human dignity and existence.

In *Achuthan and Another (on behalf of Banda and others) v Malawi*⁸⁶, the Commission stated that the conditions of overcrowding and acts of beating and torture that took place in prisons in Malawi contravened Article 5 of the Charter.

3.5 Protection from deprivation of property

It is interesting to note that under both documents, this right is guaranteed but can be deprived if it is done in the interest of the public.⁸⁷ While the article under the Charter is general but short, the Zambian bill of rights is more specific. It makes reference to the right to own property and for conditions under which it can be interfered with. However, the court will not easily accept an argument by the state the certain property is being compulsorily acquired in the interest of the public when it feels such is being done with bad faith.

In the case of *Wise v Attorney-General*⁸⁸, it was held that: the notices of intention to acquire property and to yield up possession were irregular and unlawful and therefore nullified; further that the compulsory acquisition of the said two farms was null and void ab initio. The commission in *Malawi African Association and others v Mauritania*⁸⁹ stated that the confiscation and looting of the property of black Mauritians and the expropriation or destruction of their

⁸⁶ (2000) AHRLR 144 (ACHPR 1995)

⁸⁷ Article 16 of the Zambian Constitution and Article 14 of the Charter

⁸⁸ (1991) Z.R. 124

⁸⁹ (2000) AHRLR 149 (ACHPR 2000)

land and houses before forcing them to go abroad constituted a violation of the right to property as guaranteed in article 14.

3.6 Fair Trial

It is worth noting that Article 18 of the Zambian Constitution is substantively similar to Article 7 of the Charter. Both documents place emphasis on fair trial, within a reasonable time by an independent and impartial court established by law. The right to representation by counsel and to be presumed innocent until proved guilty.

Due process of the law demands that once a person is arrested or detained, they must be charged and brought before a judge or any judicial officer authorized by law within a reasonable time. In *Henry Kalenga v Zambia*⁹⁰, the complainant's right to be promptly informed about the reasons for his arrest and the charges against him, was violated, as it took the state party authorities almost one month to inform him. In *Huri-laws v Nigeria*⁹¹ the Commission observed in its resolution on the right to *Recourse and Fair trial of 1992* that; "... the right to fair trial includes, *inter alia*, (b) Persons who are arrested shall be informed, at the time of arrest, in a language which they understand, of the reason for their arrest and shall be informed promptly of any charges against them. Wale's detention without charge and trial clearly violates Article 7(1) (a) and (d) of the African Charter.⁹² The Commission in *Abubakar v Ghana*⁹³, held that detention for seven years without trial violated the 'reasonable time' standard stipulated in the Charter.

⁹⁰ Communication 326/1988

⁹¹ (2000) AHRLR 273 (ACHPR 2000)

⁹² Constitutional Rights Project and Another v Nigeria(2000) AHRLR 235 (ACHPR 1999)

⁹³ (2000) AHRLR (ACHPR 1996) Comm.103/93

3.7 Freedom of Conscience

Just like the Zambian bill of rights in Article 19, the Banjul Charter combines the freedom of the practice of religion with that of conscience and profession.⁹⁴ Article 19 (1) of the Zambian bill of rights provides that except with his own consent, a person shall not be hindered in the enjoyment of his freedom of conscience, and for the purposes of this Article the said freedom includes freedom of thought and religion, freedom to change his religion or belief, and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.

The separation of religion from the state is important if freedom of religion is to be realised. In some countries there is a total union between the state and the means of worship, while in others there is what are called state religions. For example, in many Arab countries, Islam is declared a state religion and religious law, i.e., Sharia, declared applies to all. In other states, a state religion extends even to the level of finances and the income of the individual. In the Federal Republic of Germany, for instance, every citizen has a duty to pay a given percentage of his/her yearly income to his/her church.⁹⁵

The original 1991 Zambia Constitution did not contain, in its preamble, a declaration that Zambia shall be a Christian nation; it is the 1996 Constitution which introduced it. However, it is worth noting that there is no substantive provision declaring Zambia as a Christian nation. A leaf can therefore be taken from Article 11 which the Supreme Court in the Nkumbula case⁹⁶ stated

⁹⁴ Article 8

⁹⁵ C.M. Peter p28

⁹⁶ (1972) Z.R. 204 (C.A.)

that it was a mere statement declaring the principles in the embodied in the following Articles. Therefore, is submitted that this declaration in the preamble is not justiciable.

3.8 Freedom of Expression

Freedom of expression consists of two basic rights: the right to express and disseminate opinions in any form and the right to freely receive information from any source without restriction.⁹⁷ The Banjul Charter provides for this right in Article 9. This Article is not as elaborate as the one provided for under the Zambian Bill of Rights. The former merely provides that it is the right of every individual to receive information and disseminate information. The Zambian Bill of Rights on the other hand under Article 20 (1) provides that: *“Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence.”*

The State Securities Act⁹⁸ it has been argued⁹⁹that, although some of the provisions embodied in the Act serve legitimate security purposes, there are nevertheless other provisions which seriously undermine some of the pillars of democracy, particularly freedom of expression, transparency and accountability government. In particular, section 4 and 5 of the Act go beyond a legitimate national interest since their effect is to indiscriminately deny the public to

⁹⁷ A. W. Chanda, ‘The State Security Act vs. Open Society: Does a Democracy Need Secrets?’ *Zambia Law Journal* Volume 99 (1997)

⁹⁸ *ibid*

⁹⁹ *ibid*

information in the hands of the state regardless of whether that information affects national security or not. In so far as it does not distinguish between documents or information that have a bearing on national security and those that do not, goes too far to restricting the right of the people to know.¹⁰⁰

Similarly, it has been contended that section 69 of the Penal Code to a certain extent limits the enjoyment of the right to freedom of expression. This section makes it a criminal offence to defame the president. What raises the controversy is the fact that the president can utter any statements which may boarder on defamation but not face any legal action whereas this is not the case as against the president.

In the case of *The People v Bright Mwape and Fred Mmembe*¹⁰¹, the criminal charge against the Applicants appears to have arisen from some article, which appeared in a Newspaper called Weekly Post, referring to the Republican President in a derogatory term. The Applicants who were described in the charge sheet as journalists and who were alleged to have jointly and whilst acting together published the offending article did not plead to the charge but raised a preliminary issue as to the constitutionality of Section 69 of the Penal Code.

The court held that Section 69 does not deprive any citizen the right to legitimately criticise the President or the Government. Further that Section 69 of the Penal Code Cap 146 of the Laws of Zambia is not in conflict with Articles 20 or 23 of the Constitution of Zambia. It appears that

¹⁰⁰ A.W. Chanda, 'The State Security Act vs. Open Society: Does a Democracy Need Secrets?' *Zambia Law Journal* Volume 99 (1997)

¹⁰¹ (1996) Z.R. 118

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what will be considered defamatory is not criticism of government but rather, personal attacks on the president or any person in authority. In *Media Rights Agenda and Others v Nigeria*¹⁰²...the Commission emphasised that it should be assumed that criticism of the government does not constitute an attack on the personal reputation of the Head of State. People who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens; otherwise public debate may be stifled altogether.

The Commission states a general principle that applies to all rights, not only to freedom of expression. Governments should avoid restricting rights, and have special care with regard to those rights protected by constitutional or international human rights law. No situation justifies the wholesale violation of human rights. In fact, general restrictions on rights diminish public confidence in the rule of law and are often counter productive.¹⁰³ According to Article 9 (2) of the Charter, dissemination of opinions may be restricted by law. This does not mean that national law can set aside the right to express and disseminate one's opinions; this would make the protection of the right to express one's opinions ineffective. To allow national law to have precedent over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provisions of the Charter.¹⁰⁴

3.9 Freedom of Association and Assembly

Freedom of association entails the right to interact with other members of the community in any form for the purpose of pursuing a common interest. It is therefore a right which enables people

¹⁰² (2000) AHRLR 200 (ACHPR 1998)

¹⁰³ *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998)

¹⁰⁴ *ibid*

to come together without fear of persecution.¹⁰⁵ The African Charter provides for these rights in separate Articles¹⁰⁶ whereas under the Zambian bill of rights, these are encompassed under one Article; Article 21.

*In civil Liberties v Nigeria*¹⁰⁷ it was said that freedom of association is enunciated as an individual right and is first and foremost a duty for the state to abstain from interfering with the free formation of associations. There must always be a general capacity for citizens to join without state interference, in association in order to attain various ends. In regulating the use of this right the competent authorities should not enact provisions which would limit the exercise of this freedom.

In the case of *Christine Mulundika and 7 others v The People*¹⁰⁸, the appellant challenged the constitutionality of certain provisions of the Public Order Act Cap 104, especially section 5(4). The challenge followed on the fundamental freedoms and rights guaranteed by arts 20 and 21 of the Constitution. A subsidiary challenge related to the exemption of certain office-holders from the need to obtain a permit. It was held that section 5(4) of the Public Order Act Cap 104 contravenes arts 20 and 21 of the Constitution and is null and void.

The Supreme Court firmly acknowledged that there is nothing wrong with legal provisions which serve purely regulatory public order interests. The Court felt that section 5 (4) simply went

¹⁰⁵ C.M. Peter p29

¹⁰⁶ Articles 10 and 11 respectively

¹⁰⁷ (2000) AHRLR 186 (ACHPR 1995)

¹⁰⁸ (1995) Z.R. 239

to come together without fear of persecution.¹⁰⁵ The African Charter provides for these rights in separate Articles¹⁰⁶ whereas under the *Zambian* bill of rights, these are encompassed under one Article; Article 21.

*In civil Liberties v Nigeria*¹⁰⁷ it was said that freedom of association is enunciated as an individual right and is first and foremost a duty for the state to abstain from interfering with the free formation of associations. There must always be a general capacity for citizens to join without state interference, in association in order to attain various ends. In regulating the use of this right the competent authorities should not enact provisions which would limit the exercise of this freedom.

In the case of *Christine Mulundika and 7 others v The People*¹⁰⁸, the appellant challenged the constitutionality of certain provisions of the Public Order Act Cap 104, especially section 5(4). The challenge followed on the fundamental freedoms and rights guaranteed by arts 20 and 21 of the Constitution. A subsidiary challenge related to the exemption of certain office-holders from the need to obtain a permit. It was held that section 5(4) of the Public Order Act Cap 104 contravenes arts 20 and 21 of the Constitution and is null and void.

The Supreme Court firmly acknowledged that there is nothing wrong with legal provisions which serve purely regulatory public order interests. The Court felt that section 5 (4) simply went

¹⁰⁵ C.M. Peter p29

¹⁰⁶ Articles 10 and 11 respectively

¹⁰⁷ (2000) AHRLR 186 (ACHPR 1995)

¹⁰⁸ (1995) Z.R. 239

too far in giving unlimited power to the regulating officer, reducing “the fundamental freedoms to a mere license to be granted or denied on the subjective satisfaction of a regulating officer. The fact or possibility that permission to assemble and to speak may be refused, so that constitutional freedoms are deemed altogether on improper or arbitrary or even unknown grounds, renders the subsection objectionable for a variety of reasons”.

The Zambian government’s reaction this decision was unusually swift and decisive. On 27th February, 1996, the Zambian Parliament passed a new, revised version of the Public Order Act requiring at least fourteen days notice to be given to the police officer prior to any public meeting, assembly or demonstration. This bill was passed in an uncharacteristically rapid manner, being ratified into law by Parliament in only one sitting.¹⁰⁹

In a subsequent case¹¹⁰ to deal with the Public Order Act, the Supreme Court stated that section 5 of the Act, in its current form, does not require a person wishing to hold a public meeting or procession or demonstration to obtain a permit from the police for such an event. All that is required by law is a notification to the police at least 7 days before the event. Once a notification has been received, the regulating officer has an obligation to propose an alternative date and time, on which the said event should take place, if the police cannot police it.

It is submitted that this new requirement has in effect made it more difficult for people wishing to hold a gathering. This is due to the fact that the police are in the habit of giving the reason that

¹⁰⁹ S. Ruedisili. ‘Zambia’s Elusive Search for a Valid Public Order Act: An Appraisal’ *Zambia Law Journal* Volume 25-28 (1993-1996)

¹¹⁰ Resident Doctors Association of Zambia v Attorney General (2003) Z.R. 88

the event will not take place because they are unable to police it due to shortage of manpower. This to a large extent undermines the enjoyment of the constitutionally guaranteed rights.

3.10 Freedom of Movement

Restriction of freedom of movement is felt more than infringement of other rights because the exercise of this freedom involves almost everyone. In principal, one should be able to move as freely as one likes without restriction. However, at times, restrictions have been introduced mainly in realisation of the fact individuals are part of society in which they live. Therefore, in exercise of various freedoms, including that of movement, one ought to take into account the fact that the rights of other human beings also have to be respected.¹¹¹

The Banjul Charter, in advocating freedom of movement, adds a small clause that the freedom has to be exercised subject to the individual abiding by the law.¹¹² However, there are instances when the exceptions to the rule become more important than the rule itself. Specifically, in some situations the set of restrictions to this freedom are so many that they make the freedom unrealisable.¹¹³ The Zambian Bill of Rights provides freedom of movement with the right hand and takes it away with the left by listing a number of exceptions to the enjoyment of this right.

More restriction of movement of the individual is through detention without trial. It is a notorious fact that such detentions were the order of the day during Zambia's one party state era. Detention without trial means imprisonment of an individual without guilt having been proven before a court of law. A victim of such an imprisonment is usually a suspect whose conduct and

¹¹¹C.M Peter p21

¹¹² Articles 12(1) and 12(2)

¹¹³ Article 22 of the Zambian Constitution

acts are alleged to be prejudicial or dangerous to the security of the state.¹¹⁴ In *Re Kapwepwe and kaenga*¹¹⁵ the Court stated that “the machinery of detention or restriction without trial is, by definition, intended for circumstances where the ordinary criminal procedure is regarded by the detaining authority as inadequate to meet the particular situation... and the fact that there is no onus on the detaining authority to prove any allegation beyond reasonable doubt, or indeed to any other standard.” Similarly, in *John Chisata and Faustinos Lombe v Attorney-General*,¹¹⁶ the court stated that it is not concerned with the truth or falsity of the grounds of detention but is merely concerned with whether or not there was reasonable cause to suspect the appellants.

3.11 Right to Equality

Equality or non-discrimination is a cross-cutting principle of human rights discourse as it forms the most important if not the basic human right. Thus, it is not surprising or accidental that it was placed in Article 1 of the Universal Declaration of Human Rights 1948. This Article provides that: “*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*”

The provisions to secure non-discrimination on the grounds of race, tribe, place of origin, political opinions were especially important to Zambia with its experience of a long history of racial antagonism between Africans and Whites, especially during the federal period.¹¹⁷ The Independence Constitution did have a stipulation in the ‘declaratory section’ prohibiting discrimination, inter alia, on grounds of sex: but this method of protecting a right is not

¹¹⁴ C.M. Peter p23

¹¹⁵ (1972) Z.R. 248

¹¹⁶ (1981) Z.R. 35

¹¹⁷ *ibid* 100

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¹¹⁴ C.M. Peter p23

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¹¹⁷ *ibid* 100

enforceable in law as per *Nkumbula case*. What the Commission inevitably wanted to see was the actual incorporation of the freedom from discrimination on grounds of sex in the appropriate substantive provisions in the constitution dealing with freedom from discrimination. However, when the one-party constitution was finally enacted, the promised inclusion of a stipulation to that effect was never, in fact implemented. Again, only in the declaratory section of the one-party constitution does this stipulation occur.¹¹⁸

This right has wide-ranging implications. It means that no human being should be regarded as inferior due to race, ethnic group, sex, language, religion, or political or other opinions. Therefore, social status, wealth, nationality, class and similar attributes should never be taken as criteria for grading human beings. This is a right against all forms of discrimination. Both the Banjul Charter and the Zambian Bill of Rights recognise and provide for this right.¹¹⁹

Certain principles have been developed to make the right to equality a reality. Among these is the provision of equal rights before the law. This principle has been underlined in the two documents under discussion. The Banjul Charter is brief and general on this issue, while the Zambian Bill of Rights is more elaborate.¹²⁰ The latter forbids certain practices by the agencies of the state which limit the quality of the parties before the law. It is for instance forbidden under Article 23 (2) for a person to 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. This is subject to some limitations as set out in the Article but this is to be seen as a

¹¹⁸ *ibid* 101

¹¹⁹ Article 23

¹²⁰ Article 3 and 7 of the Banjul Charter are guiding in this respect. Article 3 deals with equality before the law and Article 7 deals with aspects of fair trial.

general prohibition on any type of discrimination. For instance in the case of *Edith Zewelani Nawakwi v Attorney General*¹²¹, it was held inter alia that the petitioner had been unfairly discriminated against on the ground of sex. It was also held that a mother of a child does not need to get the consent of the father to have her child/ren included in her passport or for him/or them to be eligible for obtaining passports or travel documents.

One issue which has also become topical in the recent years within the realm of human rights is that of sexual minorities. The Penal Code¹²² of Zambia outlaws sexual relations between people of the same sex. The African Charter outlaws discrimination on the basis of an open-ended number of factors. The right to equal treatment of sexual minorities should also be respected.¹²³ The National Constitutional Conference (NCC) has recently adopted a clause in the Draft Constitution prohibiting same sex marriages. This is according to a clause introduced by the Human Rights Committee of the NCC as an addition to the Mung’omba draft constitution which provides in Article 47 (3) that “a person who is eighteen years of age or older has the right to freely choose a spouse of the opposite sex and marry.” The Committee added clause 5 to read that: “marriage between persons of the same sex is prohibited.”

However, In *Toonen v Australia*¹²⁴, the Committee found that sexual orientation is an “other status” for the purposes of the covenant. It was of the view that the criminalisation of homosexuality in Tasmania was unreasonable and interfered arbitrarily with Mr Toonen’s right to privacy under Article 17 (1) of the International Covenant on Civil and Political Rights

¹²¹ (1990-1992) Z.R. 112
¹²² Cap 87 of the Laws of Zambia in section 177.
¹²³ Shadow Report on Zambia’s Initial State Report to the African Commission on Human and Peoples’ Rights.
¹²⁴ U.N DOC. CCPR/C/50/D/488/1992 (1994), Communication No. 288/1992

Similarly, in *Dudgeon v U.K*¹²⁵, the European Court of Human Rights clarified that any interference must be “necessary in a democratic society”, a condition which does not have the flexibility of such expressions as “useful,” reasonable” or “desirable” but implies the existence of a pressing social need for the interference in question.

Nonetheless, it is submitted that the African Charter under Article 27 (2) provides that, the rights of the Charter “shall be exercised with due regard to the rights of others, collective security, *morality* and common interest.” One may thus argue that the law prohibiting same sex marriages or relations is one that takes into account morality and is captured by the limitation in Article 27. In *Constitutional Rights Project and Others v Nigeria*¹²⁶ it was stated that legitimate reasons for limitations of the rights and freedoms of the African Charter are found in Article 27 (2), that is, that the rights of the Charter “shall be exercised with due regard to the rights of others, collective security, *morality* and common interest

3.12 Conclusion

In conclusion, it can be said that while it is difficult to find exact similarities between the two documents in terms of formulation of the rights, the rights contained in both centre on individual rights. The African Charter goes on to provide for people’s rights and the right to health, education, right to participate freely in the government, the right to work and the right to family, while these are absent in the Zambian bill of rights. It is not the scope of this paper to delve into the justification of these absences. Whereas the Zambian bill of rights provides for the right to

¹²⁵ Application No. 7525/76 2007
¹²⁶ (2000) AHRLR 227 (ACHPR 1999)

privacy, the African Charter does not. The paper will now proceed to the next chapter to look at the enforcement mechanisms provided under both documents.

Chapter Four

4.0 Enforcement Mechanism: A Comparison

4.1 INTRODUCTION

As earlier explained, it is difficult to find exact similarities between the two documents due to the differences which have already been explained. Under the Zambian Constitution, any person alleging that a fundamental right has been, is being, or is likely to be contravened “in relation to him” may apply to the High Court for redress. The Court is then under a duty to hear and determine the justiciable issues involved and, in consequence, may make such orders, issue such writs and give such directions as it may consider appropriate.¹²⁷ However, there is no express or specific mention of the orders or writs which the court may issue in the Zambian provision.¹²⁸

In the case of *Harry Mwaanga Nkumbula v Attorney General*¹²⁹, the concept of locus standi received a detailed and thorough consideration by the Court of Appeal. The president of the Court of Appeal for Zambia, Baron, J., ruled on behalf of the court that: section 28 (1) has no application to proposed legislation of any kind, far less to a proposal to amend Chapter III itself. “I entertain no doubt whatever that this section applies only to executive or administrative action (or, exceptionally, action by a private individual) and that this is so is underlined by the existence of the words 'in relation to him'. Thus, if there is on the statute book an Act of Parliament, or subsidiary legislation, which it is alleged contravenes the Constitution, it is not open to any individual to come to court and ask for a declaration to this effect; before the individual has locus stands to seek redress there must be an actual or threatened action in relation to him.”

¹²⁷ Article 28

¹²⁸ Zimba p.106

¹²⁹ (1972) Z.R. 204

Finally, under the Constitution of Zambia no application can be made in respect of a bill that it would, if enacted into law, infringe any of the guaranteed rights. Thus in the Nkumbula case¹³⁰, since the applicant was contending against that the government's plan to introduce legislation in future bringing about a "one –party participatory democracy will infringe his rights under the constitution in its present form", the Court stated that "the existence of section 28(5) makes it clear that if the only step taken by the executive is the introduction of the bill in question, subsection (1) cannot be invoked..."

4.2 The Commission and the Court

In June 1998, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (Protocol) was adopted by the Assembly of Heads of State and Government of the Organisation of African Unity (OAU) in Ouagadougou, Burkina Faso. With the deposit of the 15th instrument of ratification by the Union of Comoros on 26 December 2003, the requisite number of ratifications were received by the Chairperson of the African Union (AU) Commission in Addis Ababa, allowing the Protocol to enter into force on 25 January 2004.¹³¹

The situation, once the African Human Rights Court has been established, will not be substantially different from that which obtains currently with respect to the African Charter of which all African states, members of the AU, are parties.¹³² Although the African Commission does not enjoy the authority of a court, the Commission nonetheless has had to remind states in

¹³⁰ *ibid*

¹³¹ <http://www.africa-union.org> (accessed 31 January 2004).

¹³² N.B. Pityana, *Reflections on the African Court on Human and Peoples' Rights*

recent judgments that, in terms of article 1, states undertook to ‘recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them’.¹³³ Much earlier, the African Commission recommended a formula for consideration by states on how they could introduce into their constitutions, laws, rules, regulations and other acts relating to human and peoples’ rights, the provisions in articles 1 to 29 of the African Charter.¹³⁴In *Legal Resources Foundation v Zambia*,¹³⁵ the African Commission ruled that ‘international treaties which are not part of domestic law and which may not be directly enforceable in the national courts, nonetheless impose obligations on state parties ...’ The jurisdiction of the African Commission therefore is that state parties to the Charter are bound by their treaty obligations as interpreted by the African Commission in the execution of its mandate.

4.3 The African Court: Its powers and jurisdiction

The Protocol clearly asserts that the African Human Rights Court will *complement* the protective mandate of the African Commission. ‘Complement’ must surely be understood to mean that it will reinforce and make more complete the objectives of the Charter. That suggests that both the Court and the Commission will coexist as independent bodies but within a mutually reinforcing relationship.¹³⁶ By reason of its status as a court, the African Court will be the final arbiter and interpreter of the African Charter.¹³⁷ The jurisdiction of the Court is confined to the interpretation and application of the African Charter and any other international human rights

¹³³ Article 1 of the African Charter

¹³⁴By resolution at the 5th ordinary session in 1989. In the communications against Zambia, in the *Amnesty International* matter, the Commission ruled that states should not easily resort to claw-back clauses as ‘recourse to these should not be used as a means of giving credence to violations of the express provisions of the Charter’.

¹³⁵ Communication 211/98, Fourteenth Annual Activity Report

¹³⁶ N.B. Pityana

¹³⁷ A. Ibrahim, ‘The future relationship between the African Court and the African Commission’ (2002) 2 *African Human Rights Law Journal* 252-260.

instruments *ratified by the states concerned*.¹³⁸ One may argue that this serves as a limitation. It means that the court will only entertain hearing matters that are demonstrably and prima facie within the mandate of the court. It does not hear matters or disputes relating to the Constitutive Act nor does it entertain disputes between states, say border disputes unless such disputes can be categorised as human rights disputes as was the case in the communication from the *Democratic Republic of the Congo v Rwanda, Burundi, Uganda*.¹³⁹ It would not be within the competence of the court to impose a treaty obligation on states that have not assumed the duty by themselves.¹⁴⁰

The major differences between the two documents have already been discussed. They relate to authorship and the audience to whom the documents are addressed. There are differences also in terms of enforcement.¹⁴¹ Before the establishment of the court, it was felt that the African Charter, while well-framed in language and form, lacked teeth when it came to putting it in action. There was little that the commission could do other than communicate its findings to the state alleged to be in violation of the Charter.¹⁴² However, with the establishment of the Court the state parties to the Protocol undertake, in terms of article 30, ‘to comply with the judgment in any case where they are parties within the time stipulated by the Court and *to guarantee its execution*’.¹⁴³ In other words, the states take primary responsibility for the execution of the judgments of the Court. Should the affected states fail to do so, other persuasive and coercive means are available to the AU. The Court submits its reports to the regular session of the

¹³⁸ Art 7 of the Protocol.

¹³⁹ Communication No 227/99

¹⁴⁰ R.W. Eno ‘The jurisdiction of the African Court of Human and Peoples’ Rights’ *African Human Rights Law Journal* (2002), 2.

¹⁴¹ C.M. Peter p92

¹⁴² *ibid*

¹⁴³ Art 30 of the Protocol

Assembly,¹⁴⁴ and the provision goes on to state that the report must ‘in particular, specify the cases in which a state has not complied with the Court’s judgment’.¹⁴⁵

4.4Conclusion

The two documents highlighted here are of extreme importance to the African people in general and particularly, Zambians. It is important that human rights are respected by the state and in an event where there is a breach, there is need to have effective enforcement mechanisms for redress. The Zambian Constitution in its Article 28 emphasises on the concept of locus standi. Only a person who is, is being, or is likely to be affected is given locus to seek redress from the High Court. It is hoped that with the establishment of the African Court, the weaknesses in terms of enforcement of the Commission’s decisions will be remedied. Under the new system, the states take primary responsibility for the execution of the judgments of the Court. Should the affected states fail to do so, other persuasive and coercive means are available to the AU.

¹⁴⁴ *ibid*

¹⁴⁵ *ibid*

Chapter Five

5.0 GENERAL CONCLUSIONS AND RECOMENDATIONS

5.5.1 Conclusions

As seen from Chapter 1 of the Paper, Zambia Ratified the African Charter on Human and Peoples' Rights (also known as the Banjul Charter) in 1987. Thus, this places a mandate on Zambia to honour the international obligations contained in this instrument as failure to do so would defeat the whole purpose of treaty ratification. International human rights standards must always prevail over contradictory national law. As a 'dualist' state; Zambia is required to enact legislation to give full effect to the African Charter. In line with the Commission's Jurisprudence, the lack of domestication constitutes a violation of Article 1 of the African Charter.

Both documents centre on what are known as basic or fundamental rights of the individual.¹⁴⁶ The difference between the two is twofold. First, while the Zambian bill of rights is a national law, applying only in one country, the African Charter is a regional instrument applying to countries signatory to it. The latter is therefore general and has a wider application. Second, the African Charter came into force on 21st October, 1986, whereas the current Zambian constitution came into force in 1991 and amended in 1996. Another feature worth noting is that while the Zambian bill of rights restricts itself on basic rights and freedoms, the African Charter goes a step further by including what are termed as peoples' rights. These are rights an individual can only enjoy in a collective sense as a member of a community.

¹⁴⁶C. M. Peter

Chapter 2 looked at the historical evolution of both the Zambian bill of rights and the African Charter. It was shown that Zambian bill of rights has undergone some major transformation since its incorporation. These changes range from it been entrenched to being unentrenched, to restricting freedom of association as a result of the introduction of one party state rule to the return of multi-partism which once again guaranteed the right to free association. The African Charter on the other hand came into being as a result of series of conferences held around the African continent where it was felt that there was need to have a human rights document which would reflect the African ideology of human rights.

In a nutshell, the discussion in chapter 3 compared the fundamental rights under the Zambian bill of rights to those under the African Charter. It is submitted that while it is difficult to find exact similarities between the two documents in terms of formulation of the rights, the rights contained in both centre on individual rights although the African Charter goes an extra mile to provide for people's rights. The African Charter goes on to provide for people's rights and the right to health, education, right to participate freely in the government, the right to work and the right to family, while these are absent in the Zambian bill of rights. Whereas the Zambian bill of rights provides for the right to privacy, the African Charter does not. Various decisions from the Zambian Courts and the African Commission were cited to give credence to the arguments advanced.

Chapter four looked at the enforcement mechanisms provided for under both documents and once again, it was established that it is difficult to find exact similarities between the two

documents. Under the Zambian bill of rights, a person who alleges a violation of his or her rights can seek redress to the High Court pursuant to Article 28. It is hoped that with the establishment of the African Court, the weaknesses in terms of enforcement of the Commission's decisions will be remedied. Under the new system, the states take primary responsibility for the execution of the judgments of the Court. Should the affected states fail to do so, other persuasive and coercive means are available to the AU.

5.1 RECOMENDATIONS

5.1.1 Domestication of Banjul Charter

Since human rights have been given international primacy and there respect and protection as a precondition to aid from the developed world, there is need for Zambia, which Ratified the African Charter on Human and Peoples' Rights (also known as the Banjul Charter) in 1987 to domesticate it. International human rights standards must always prevail over contradictory national law. As a 'dualist' state; Zambia is required to enact legislation to give full effect to the African Charter. In line with the Commission's Jurisprudence, the lack of domestication constitutes a violation of Article 1 of the African Charter.

Thus, the Centre for Human Rights¹⁴⁷ called upon the Commission to recommend that Zambia fully domesticated the African Charter- in particular by enacting as justiciable guarantees the socio-economic rights that are included in the African Charter.

¹⁴⁷ Shadow Report

5.1.2 Death Penalty to be imposed only on most Serious Crimes

According to the Banjul Charter, the right to life can be ensured through inviolability of the person and respect of the dignity, liberty, and security of the person.¹⁴⁸ In *Malawi African Association and Others v Mauritania*¹⁴⁹ the African Commission stated that denying people food and medical attention, burning them in sand and subjecting them to torture to the point of death, point to a shocking lack of respect for life, and constitutes a violation of Article 4.

The death sentence is mandatory in Zambia. On 23 February 2007, the government stated that it intends to retain the death penalty.¹⁵⁰ The government is urged to abolish the death penalty in toto, or, at the very least, to limit the imposition of the death penalty to only the most serious crimes, in line with the Commission's 'Resolution urging the States to Envisage a Moratorium on the Death Penalty' (1999)."¹⁵¹

5.1.3 Need for Freedom of Information Bill

It is also recommended that the State Securities Act¹⁵² although some of the provisions embodied in the Act serve legitimate security purposes, there are nevertheless other provisions which seriously undermine some of the pillars of democracy, particularly freedom of expression, transparency and accountability government.

¹⁴⁸ Article 4 of the Charter

¹⁴⁹ (2000) AHRLR 149 (ACHPR 2000)

¹⁵⁰ Zambia: *Death penalty will stay on statute books* – Minister; AllAfrica.com, 24/02/2007

¹⁵¹ Shadow Report

¹⁵² *ibid*

In particular, section 4 and 5 of the Act go beyond a legitimate national interest since their effect is to indiscriminately deny the public to information in the hands of the state regardless of whether that information affects national security or not. In so far as it does not distinguish between documents or information that have a bearing on national security and those that do not, goes too far to restricting the right of the people to know.¹⁵³ Thus, there is need to have a Freedom of Information Act. Such a statute must designate only those specific and narrow categories of information that it is felt is necessary to withhold in order to protect the legitimate national interests.¹⁵⁴

¹⁵³ A.W. Chanda

¹⁵⁴ R. Errera, Press Freedom in France, in Article 19 (Ed). *Press Law and Practice: A Comparative Study of Press Freedom in European and other democracies* (1993), 60-70.

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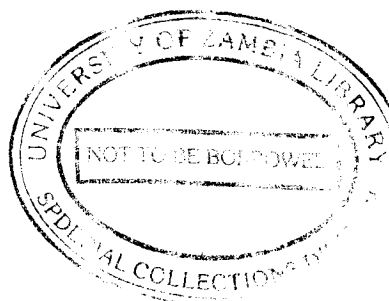
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