(xiv) General Derogations.

Article 25 of the Constitution provides that nothing contained or done under the authority of any law shall be held to be inconsistent with or in contravention of Articles 13, 16, 17, 19, 20, 21, 22, 23 or 24 . So, if there is a law which derogates from these Articles, apart from the derogations already permitted under the Articles themselves, such derogations are permitted under Article 25.

The most severe derogations from fundamental rights occur during states of emergency. Repeatedly, Courts have held that the President is not obliged to give any reason for declaring a state of emergency. This was the firm view of the Court in **Dean Mung'omba** and **Kenneth Kaunda** cases in which the applicants separately petitioned the High Court for writs of habeas corpus. Mr Justice Kabalata in Mung'ombas case refused to grant the applicant the writ and Mr. Justice Joseph Mutale similarly rejected the former President's application.[96] The President is only required to consult his cabinet before he declares a state of emergency.[97] The derogations permitted under Article 25 of the Constitution are not compatible with the provisions of Article 4 of the

International Covenant on Civil and Political Rights. For example, no derogation is permitted under the ICCPR in respect of the right to life, inhuman treatment and slavery even under a state of emergency.

During a state of emergency, state security wings are given extensive powers of search and detention which are open to abuse. Given these wide derogations, the Courts are looked upon as a major institution capable of redressing any grievance during states of emergency. The extensive powers of the State during states of emergency were used in placing, former Republican President Kenneth Kaunda under house arrest in his own home in Kalundu in Lusaka which for the purposes of his incarceration was gazetted a prison. Unfortunately, members of his immediate family who lived with him in the house had to abide by the provisions of the Prisons Act which controlled their movements.[98]

SECTION 4: Enforcement Provisions

The enforcement of the protective provisions discussed above is provided for under Article 28 of the Constitution. Under this Article if any person alleges that any of the provisions of Articles 11 to 26 inclusive **has been, is being**

or **is likely** to be contravened in relation to that person, then that person may apply for redress to the High Court.

Upon such application the High Court shall hear and determine such an application. The Court may make such **Orders,** issue such **Writs** and give such **directions** as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of Articles 11 to 26 inclusive.

If the allegation is that a protective provision **has been** contravened the petitioner will be seeking a **curative** adjudication from the Court to redress the alleged mischief. In the **Feliya Kachasu** case of 1967, the Petitioner, a girl of 11 to 12 years sued the Attoney-General through her father, Paul Kachasu, seeking redress under Section 28 of the then Constitution of Zambia. That Section is now called **Article** 28. The Petition was by way of an Originating Notice of Motion.[99] It was before the Chief Justice John Blagden sitting as a single Judge of the High Court.

The facts of the case were that in October, 1966 the Applicant or Petitioner refused to sing the National Anthem or

to salute the National Flag, because she alleged that, these actions were akin to religious ceremonies and were contrary to her religious beliefs and views as a **Jehovah's Witness** or **Watchtower**. She was suspended from her school at Buyantashi in Mufulira. She prayed the Court to declare the suspension unlawful on the ground of religious discrimination, freedom of association and conscience.

The learned Judge found that the school regulations under the Education Act of 1966 under which she was suspended did not conflict with Section 21 of the then Constitution which protected freedom of concience. The Court declared that whatever hinderance the Applicant suffered in the enjoyment of her freedom of conscience was reasonably justifiable in a democratic society and was authorised by laws which were reasonably required in the interests of defence and to protect the rights of others. The learned Chief Justice found in favour of the Attorney General and condemned Feliya Kachasu in costs[100].

In **Harry Mwaanga Nkumbula** the Petitioner claimed that his rights under the Constitution were **likely** to be contravened as a result of a proposal to turn Zambia into a

one-party state. He was seeking **preventive** adjudication which is permited under Article 28(1) of the Constitution.[101]

Suprisingly, the Supreme Court with Mr. Justice Baron sitting as Judge President refused to grant Nkumbula his claim because the provisions of subsection (5) of section 28 of the Constitution which provided that no application shall be brought under subsection 1 of Section 28 had not been contravened. This subsection provides that a proposed bill which had not yet become law could not be the subject of a Petition. No executive or administrative action had been taken against the appellant and there was no allegation that such action was threatened against him. In the view of the Court the protective Section 28 could not be invoked. Nkumbula's appeal was dismissed with costs to the Attorney-General. It is surprising to see that the Court found that a likelihood of an event is not protected under the Bill of Rights. And yet, the Article provides for a situation where a person's rights are "likely" to be contravened. It is submitted that the provision in subsection 5 of Article 28 (now subsection 3 of Article 28) is in direct conflict with the provisions of subsection 1 of Article 28. This case is fully discussed in the next Chapter.

The enforcement provisions under Article 28 are further circumvented by Statutes that protect the state. For example, the State Proceedings Act[102] provides that Courts shall not grant injunctions or make orders for specific performance against the state. In **Zambia National Holdings Limited** and **United National Indepence Party v. The Attorney-General,** the Petitioners had applied inter alia, for an injunction to restrain the state from remaining on their premises while the substantive issue of ownership of the premises was pending before the Court Initially, the trial judge ruled that he was precluded from making such an order of injunction by Section 16 of the State Proceedings Act.

During the substantive judgement, the learned trial judge decided to re-visit the question of injunctions against the State. The trial judge changed his mind about the correctness of his earlier ruling based on Section 16, accepting the argument of Counsel for Petitioners that Section 16 of the Act contravenes the provisions of Article 28(1) and 94(1) of the constitution. Article 28(1) empowers the Court to:

> make such orders, issue such writs and give such direction as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of Article 11 to 16 inclusive

Article 94(1) provides that the High Court of Zambia has unlimited or original jurisdiction to hear and determine any civil or criminal proceedings under any law except proceedings in which the Industrial Relations Court has exclusive jurisdiction under the Industrial Relations Act.

While accepting that "there was a growing school of thought against the continued existence of State immunity against injunctive relief and other coercive order," the Supreme Court nevertheless reversed the trial judge's ruling on this point and restored Section 16 of the Act.[103] It is strongly submitted that the ruling of the Supreme Court was erroneous because there is no doubt that Section 16 of the Act contravenes the provisions of Article 28(1). These provisions empower the High Court to make any appropriate Orders, issue Writs and give directions for securing the enforcement of any provisions of Article 11 to 16 inclusive. The Petitioners in

this case had applied under Article 16 of the Constitution which guarantees protection from deprivation of property and, therefore, the High Court was free to make any order, including an injunctive order against the State.

It is also provided under Article 28 that if in any proceedings in any Subordinate (Magistrates) Court there arises a question alleging contravention of the protective Articles, the Court shall refer the matter to the High Court if any party to the proceedings so requests. However, the Magistrate may refuse the request if, in the magistrate's opinion, the question raised is frivolous or vexatious.

Conclusion

It is clear that although Zambia is a Party to International and Regional Human Rights Instruments, its domestic legislation has lagged behind modern international human rights developments. The Bill of Rights provides for the protection of the fundamental rights and freedoms of the individual but almost all the protective Articles have derogations or exception clauses. These are supplemented by

numerous pieces of legislation known as Acts of Parliament and Statutory Instruments which have eroded the little that was left in the Bill. The point, however, is not that there should not be limitations or derogations but that these should be consistent with international norms and standards. There is need for Zambia to domesticate those international human rights instruments which have not yet been incorporated into national or domestic legislation in order for the country to keep abreast of international human rights developments.

The Constitutional provisions for the protection of the fundamental rights and freedoms make it very clear that such rights and freedoms are subject to limitations. As already discussed, these limitations appear to be designed to ensure that the rights and freedoms of others are not in jeopardy and that the public interest, peace and order are always maintained. However, the current derogations are so wide that the enjoyment of most rights and freedoms have become illusory.

The Legislature, the Executive and the Judiciary have not changed much in their structures organisation and functions since independence. Colonial legislation such as the Public Order Act, the Emergency Powers Act, the Preservation

of Public Security Act, the State Security Act, the Penal Code and the Criminal Procedure Code all contain pre-independence concepts of controlling the 'native' rather than rendering the protection and promotion of human rights.

Chapter Three

Notes

1 Basson, Dion and Viljoen, Henning., **South African Constitutional Law,** Juta & Co. Ltd, Cape Town 1988, p225 et seq.

2 For detailed discussion of the need for a Bill of Rights, see Professor David Feldman in **Civil Liberties and Human Rights in England and Wales,** Clarendon Press. Oxford 1993 pp 78-79.

3 The English Bill of Rights should not be confused with a "**Bill**" in the English Parliamentary procedure which is a name given to a measure for introducing legislation whether public or private which if it passes through both Houses of Parliament and receives the Royal Assent, becomes law and becomes known as an Act of Parliament.

4 Article 79 of the Constitution of Zambia provides, inter alia, for amendment to the

Constitution and special procedures required for amendment to Part III in respect of fundamental rights and freedoms of the individual.

5 Preambular paragraph eight of the Declaration of Human Rights states: " This Universal Declaration of Human Rights is a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction".

6 Aihe, D.O., 'Neo-Nigerian Human Rights in Zambia: A Comparative Study with some countries in Africa

and West Indies' in the **Zambia Law Journal** Volumes 3 &4, 1971 &1972 Numbers 1 & 2, p.43.

7 The **Northern Rhodesia Order-in-Council of 1963** which went into operation on 3rd January 1964 conferred internal self-government for Northern Rhodesia and contained provisions with respect to fundamental rights and freedoms of the individual in Chapter 1, Sections 1-13.

8 **Report of the Advisory Commission on the Review of the Constitution of Rhodesia and Nyasaland,** Her Majesty's Stationery Office, London, 1960 Cmnd, 1148 Chapter 12 - entitled 'The Need for Safeguards'. p. 79.

9 Lord Hailey, **An African Survey: A study of Problems Arising in Africa South of the Sahara,** Oxford University Press, London 1957,m p. 708.

10 See Chapter VII, Articles 70 to 77 of the

Constitution of the Federation of Rhodesia and Nyasaland, 1953.

11 Aihe, supra note 6, p.45.

12 Basson, and Viljoen., supra note 1, p. 234.

13 Since the advent of the Third Republic Zambia has experienced two states of emergency in 1993 and in 1997. Under Emergency Regulations the President can detain any suspect on grounds of public security. The 1993 Emergency was a result of the so-called "Zero Option Plan" by which the suspects were alleged to have planned incitements of strikes and general disobedience. The 1997 Emergency was a result of an attempted coup in October of that year. The President, with the subsequent approval of Parliament lifted the emergency in March, 1998. Before 1991 Zambia was in a virtual state of emergency since

July 1964. See Dr. Alfred Chanda's article on 'Problems Affecting the Constitutional Protection of Human Rights in Commonwealth Africa', **Legality Magazine,** University of Zambia, School of Law, 1984 p 38.

14 Anyangwe, C., 'Human Rights, Holism and Relativity' **Zambia Law Journal, Vol.** 25 - 28 1993 p. 81.

14a For a detailed discussion of neo-Nigerian constitutionalism, See Alfred Chanda's article entitled 'Problems affecting the Constitutional Protection of Fundamental Human Rights in Commonwealth Africa' in **Legality Magazine,** University of Zambia, School of Law Magazine, 1984. See also Dr. D.O. Aihe's views, note 16 infra.

15 Chanda, A.W., "The State of Zambia s Bill of Rights vis-a-vis the International Protection of Human Rights Standards', presented at the Human Rights Commision Vision Conference Centre, Lusaka, 5-8 October, 1998 pp 19-20.

16 Dr. D.O Aihe, supra note 6, explains in some detail the views of the African Government in 1963 which had just taken over in Northern Rhodesia regarding the inclusion of fundamental human rights in its new constitution- pp 45-46 **Zambia Law Journal**, 1971-72, pp 45-46.

17 Preambular paragraph 5 of the African Charter on Human and Peoples' Rights reminds State parties of "the virtues of their historical tradition and the values of African civilisation which should inspire and characterise their reflection on the concept of human and peoples' rights".

18 Afronet, **Zambia Human Rights Report**, (1997) Chapter 6, p. 55 et seq.

19 Anyangwe, supra note 14, pp 81 - 106 and see also Professor Dlamini **Human Rights in Africa; Which Way South Africa?** Butterworths, Durban, 1995, Chapter 1.

20 **The Constitution of Zambia,** PartIX, Articles 110-113.

21 Ibid.

22 Ibid, Article 110.

23 Ibid, Article 111.

24 Government Paper No.1 of 1995, p15.

25 The Constitution, Article 12(1).

26 Ibid, Article 12 (2).

27 **Rosalyn Thandiwe Zulu v. The People** 1981 ZR 341.

28 **Rv Chibabe Hangumba**(1963-64) Z and NRLR 54 - 56.

29 Chapter 88.

30 Chapter 87.

31 For a detailed discussion on the age of criminal responsibilty see Dr. E. Simaluwani.

'The Criminal Process in Juvenile Courts in Zambia', **Zambia Law Journal,** Vol. 29, 1997 p. 75 et seq.

32 **Edward Jack Shamwana and 7 Others v. The People,** Supreme Court Appeal Nos 12 - 19 1983- Edward Shamwana, Godwin Mumba, Thomas Mulewa, Deogratias Symba (believed to have been a Zairean) and Albert Chimbalile lost their appeal against conviction for treason from a judgement of the High Court. But they were later pardoned under the Presidential prerogative of mercy.

33 **Amnesty International;** "Zambia: A Human Rights Review" based on the International Covenant on Civil and Political Rights' March, 1996 p. 2.

34 **Human Rights Watch** is a non-governmental organisation established in 1978 to monitor and promote the observance of internationally recognised human rights in Africa, the Americas, Asia and the Middle East.

The Report on Zambia entitled, 'Zambia: The Reality Amidst Contradictions' is contained in Vol. 9, No.3 (A) of July 1997 - The death Penalty at p 50.

35 Article 6 of the Constitution of Namibia, Chapter 3.

36 Article 11 of the Contitution of South Africa, Chapter 2.

37 This public perception was highlighted by Dr. M.P. Tjitendero, Speaker of the Namibian National Assembly in a statement delivered at a Workshop on **Human Rights** held in Windhoek under the auspices of the Raoul Wallenberg Institute, 18-24 February, 1991.

38 Dlamini, supra note 19 at pp 113-114.

39 Section 163 of the Criminal Procedure Code, Cap 88.

40 Chapter 108 and 112 respectively.

41 See Act No. 35 of 1993.

42 Chapter 96.

43 **William Steven Banda v. Attorney-General**
Supreme Court Judgement No. 16 of 1994.

44 **Nottebohm Case: Liechtenstein v. Guatamala,**
ICJ Reports, 1955, p.4.

45 **Employment Act Cap.268** as read with the Employment (Special Provisions) Act, Cap.274. This later Act makes provisions with respect to employment during any period when a declaration under Article 29 of the Constitution is in force namely, during a declaration of war.

46 See **UN Centre for Human Rights** Fact Sheet No. 14 Lund, Jan 1995, 2nd Ed. pp 218.

47 Mwanawasa, L.P., 'Should the Death Penalty be Retained in a Humanistic State?', a paper presented to a Seminar on Law and Development in Zambia held at the Savoy Hotel, Ndola on 14th January, 1989 and Chaired by this Writer.

48 **Rosalyn Thandiwe Zulu v. The People,** supra note 28

49 Chanda, A.W., 'Human Rights in Zambia's Third Republic: An Overview', a paper presented to a Seminar at the Norwegian Institute of Human Rights, Oslo, 8th June, 1995 p. 10. See also the **Afronet Report,** supra note 18.

50 In Zimbabwe. the Constitutionality of judicial whipping was considered in **S.v. Ncube & Others,** 1988(2) S.A. 702 Supreme Court of Zimbabwe.

51 See Section 5(1) of the **Lands Acquisition Act,** Cap. 189

52 **William David Cerlisle Wise v Attorney General,** 1989/HP/668 (unreported) Worthy of note is the fact that although the action was commenced in 1989, judgement was delivered in December, 1991 in the Third Republic when public opinion was largely against the previous Government.

53 **Zambia National Holdings Limited and UNIP v The Attorney General,** Supreme Court Judgement No. 3 of 1994- unreported cited as cause No. 1992/HP/661 in the High Court.

54 (1967) ZR 145.

55 (1968) ZR 99.

56 HPR/11/95, Supreme Court Judgment No. 25 of 1995.

57 J.U. Patel v Attorney-General, supra note 55, p. 129.

58 Chapter 113, then Cap. 104.

59 Christine Mulundika's Case, supra note 56 p. J19.

60 The then Vice President of Zambia, Brigadier-General Godfrey Miyanda was reported as saying that the Supreme Court's ruling was likely to spark off violence in the country - Vide **The Post,** 26 January, 1996, p. 3.

61 Section 4(5)(b), Cap 113.

62 Ibid, section 4(5)(f).

63 Cap. 108.

64 Cap.112.

65 Cap. 123.

66 See Article 18 (11) (12) (13).

67 Cap. 77.

68 Cap. 88.

69 Act. No. 37 of 1993.

70 Cap.111.

71 In **Attorney-General v Valentine Shula Musakanya** 1981 ZR1, the High Court awarded Musakanya costs but on a successful appeal by the Attorney-General, the Supreme Court adjudged that each party should bear its respective costs in both Courts. So an indigent litigant litigates at his peril.

72 Feliya Kachasu, supra note 54.

73 See Section 13(1)(2) of the Societies Act of Cap. 119.

74 **Sara H. Longwe v. Intercontinental Hotel** 1991/HP/765 (unreported)

75 See Section 2 of the Constitution of Zambia Act of 1991.

76 Section 57 of Cap.87.

77 **William Banda v Attorney General** 1992 HP/1005 (unreported).

78 **The People v. Bright Mwape and Fred M'membe** Supreme Court Appeals Nos. 87 and 107 of 1995 (unreported), p. 10.

79 Cap119, Section 13(1).

80 Ibid, Section 13(2).

81 For a detailed discussion on this topic, See Chapter Two of the **Afronet Report** of 1997, Lusaka, dated 8th April, 1998.

82 For example, Zambia is a signatory to the ICCPR, the African Charter and the ILO Convention No.87 on Freedom of Association.

83 **Cuthbert Mambwe Nyirongo v. Attorney-General,** Supreme Court Judgment No. 10 of 1991, briefly reported in **Zambia Law Journal, Vo. 21-24 (1989-92),** p.93.

84 Article 23(4).

85 Sara Longwe, supra, note 74.

86 Article 24(4).

87 Article 24(2)(3).

88 Ibid, See provio to Article 24(1).

89 Cap 274.

90 Ibid, Section 2.

91 Ibid, Section 8.

92 Cap 275.

93 See Hansungule, Michelo., 'Report on the Rights of the Child and Poverty in Zambia', a Paper prepared for **Women for Change,** Zambia, September, 1996 (unpublished).

94 Cap 53.

95 Hansungule, supra note 93.

96 **Dean Namulya Mung'omba v. Attorney-General** 1997/HP/26/7 (unreported). See also **The Times of Zambia,** Wednesday, March 11, 1998 regarding **Kenneth Kaunda's** case.

97 Article 30(1).

98 Cap. 97.

99 From 1969 the procedure changed to a Petition

under Statutory Instrument No. 156 of 1969 which provides for **Rules for the Protection of Fundamental Rights.**

100 **Feliya Kachasu** , supra note 54.

101 **Harry Mwaanga Nkumbula v. Attorney General** (1972) ZR 204.

102 Cap. 92 Section 16.

103 **Zambia National Holdings Ltd,** supra note 53. The Supreme Court dwelt on this matter at some length explaining why the learned trial judge's ruling was reversed and Section 16 of Cap. 71 (formely Cap92) restored - vide pp J2 to J9.

CHAPTER FOUR

JUDICIAL IMPLEMENTATION OF HUMAN RIGHTS

Introduction

An entrenched Bill of rights in any constitutional framework is useless unless the rights and freedoms therein entrenched can be judicially implemented and protected. The judiciary has a pivotal role to play in the interpretation of fundamental rights and freedoms of the individual as enshrined in the national Constitution.[1] Despite the return to multi-party politics, and fervent promises of democratic governance and respect for human rights, there are still persistent violations of human rights in the country especially in the criminal justice system.[2]

Constitutionally and institutionally, the responsibility of balancing the scales of justice between the individual whose fundamental rights are violated and the State or its agents being accused of such violations lies heavily on the judiciary. Since independence courts have delivered a large number of

judgments on constitutional matters involving infringements or alleged infringements of human rights.

In particular, the Third Republic has experienced a plethora of such judgments arising out of constitutional petitions of one form or another. An analysis of all the judgements of courts relating to this matter would itself be an interesting subject for another dissertation and is therefore beyond the scope of the present inquiry.

While it does not fall within the scope of this thesis to canvass all the existing human rights available under the Zambian human rights law, it is nevertheless clear that certain areas of Human Rights have been more fertile than others in terms of frequency of violations or alleged violations. A perusal of law reports and Newspapers clearly shows that there are five areas in which human rights violations appear to be more prevalent. These areas of concern are: (1) Personal Liberty; (2) Freedom of Expression; (3) Freedom of Assembly and Association; (4) Freedom of movement and (5) the Rights of Employees.

This Chapter will analyse the role which the Judiciary in Zambia has played in these areas of human rights concerns and will examine the extent to which the courts are prepared to uphold fundamental rights and freedoms of individuals in the face of a very powerful executive government.

For it is largely through the actual judging of cases that the independence of the judicary and the exercise of the rule of the law can be demonstrated[3]. The chapter will also analyse the extent to which Zambian courts apply international human rights norms in their domestic adjudication, for even though Zambia is a fledgling democracy, it is nevertheless part of the internatonal community. This international community recognises a person as a human being with indivisible and inalianable rights and freedoms.

An important factor in the implementation of human rights by the judiciary in Zambia, however, is that the country, like most English-speaking countries, is a **dualist** state. This means that any treaty or charter ratified by the State can only have domestic force when incorporated in Zambia's legal order through an Act of Parliament. In **monistic** states, such as French-speaking and Portuguese-speaking states, a treaty or charter ratified and fully published applies automatically

and binds all courts, institutions and even individuals within the state. In dualist states the authorities would have to take necessary steps to pass legislation incorporating the treaty into domestic application. If that is not done, the treaty remains inoperative domestically and the state's responsibility, in the event of any breach thereof, is engaged only externally, that is at the international level. [4]

Section 1: Courts with Jurisdiction over Human Rights

Constitutionally, if any person alleges that any protection under the Bill of Rights **has been** or **is being** or is **likely to be** contravened in relation to him that person may apply to the High Court for redress. And as already discussed the High Court is empowered to make such orders, issue such writs or give such directions as it may consider appropriate in order to enforce or secure the enforcement of any protective provisions.[5] So, it would appear to be the intention of the framers of the constitution that the High Court is the court of first instance in Human rights litigation.

Indeed, the Constitution provides that if in any proceedings before any Subordinate Court (popularly known a Magistrates Courts) there arises a question as to the contravention or likely contravention of any protective provisions under the Bill of Rights, the Court must refer the matter to the High Court at the request of any party unless the subordinate Court is of the opinion that the point raised is frivolous or vexations. [6]

It is noteworthy that the constitution talks of a human rights issue arising in the proceedings in "any Subordinate Court ". What if a human rights issue arises in the course of proceedings in any other courts in the country?[7] By implication, it would appear that courts other than the Subordinate Court, could themselves adjudicate over human rights issues if the matter arises in the course of proceedings before them. Currently, such courts include the Industrial Relations Court, which adjudicates upon matters affecting collective and individual rights and obligations of employees and employers including their respective representative organisations.[8] Other courts are Courts Martial, the Local Courts and the quasi-judicial bodies such as the Lands Tribunal.

When the Industrial Relations Court sits to adjudicate on trade union matters, on wages, on strikes, or on housing, it is in fact deciding human rights issues such as freedom of association, freedom of assembly, the rights to fair wages, the right to adequate housing, and so on. Also, since Local Courts exercise both criminal and civil jurisdiction within their areas subject to the limits prescribed in their Courts Warrants,[9] they also, in effect, invariably deal with cases that do have a human rights dimension. Similarly, Courts-Martial which also exercise criminal and civil jurisdction over military personnel under the Defence Act, inevitably adjudicate over offences which have a considerable bearing on human rights issues.[10]

Local Courts constitute the base of the country's judicial hierarchy. As such, they adjudicate upon disputes between individuals or groups of individuals especially in the area of African customary law. They exercise whatever limited jurisdiction is granted to them over numerous minor but quite significant criminal offences. They adjudicate over many cases which involve human rights violations at the lowest stratum of society, although Local Court judges do not appear to realise that they do deal with human rights issues as well.

Cases of violence against women and children abound in Local Courts. Despite the provisions of the Bill of Rights which provide paper guarantees for the protection of women and children against all forms of discrimination, the legal and traditional framework is fraught with discriminatory practices against them. Under customary law women are treated as minors even after attaining their age of majority. In the context of human rights, it is submitted that local courts play a very important role in reconciling women's and children's rights to equal treatment under the Bill of Rights on the one hand, and customary law which does not insist on equality betwen men and women on the other.[11] Thus, the law which applies to women and children in Local Courts to-day is not completely customary or traditional law because after independence the jurisdiction of Local Courts in the country embraced both customary and statutory law.[12] This combination makes it imperative for Local Courts to adjudicate over human rights issues affecting women and children despite traditional attitudes which treat women as perpertual dependants.[13]

Similarly, the Lands Tribunal, although not a Court in the traditional sense, adjudicates over land disputes and makes awards or compensation where necessary. The Bill of

Rights provides, inter alia, for protection from deprivation of property or interest in property and so strictly, if the constitution is followed, any disputes over rights to land ought to commence in the High Court. Interestingly, the Lands Tribunal appears to be at co-ordinate level with the High Court in that any appeal from it lies to the Supreme Court as is also the case with appeals from the Industrial Relations Court.[14]

From this it follows that the question as to which Court has jurisdiction over the implementation of human rights is not clear cut as the Constitution would like litigants to believe. It is difficult to envisage a complete exclusion of human rights adjudication in most Courts or Tribunals at whatever level in the country's judicial system because human rights are omnipresent in everyone's life.

Section 2: Selected Cases

The topicality and globalization of human rights has impelled many states to pay attention to human rights issues both internationally and nationally. Universally accepted norms for the protection and implementation of human rights are now gaining momentum even in the so-called fledgling democracies. However, the most effective

implementation and protection of human rights depends on the availability of a practical mechanism which ensures their enjoyment. It is submitted that the judiciary is one such vital institution for ensuring respect for rights in any democratic society[15]. Some selected cases in the human rights field where frequent violations occur will now be considered.

A. Personal Liberties

The Bill of Rights provides, inter alia, that no person shall be deprived of his or her personal liberty unless the deprivation is authorised by law.[16] A similar provision is found in the Internatioanl Covenant on Civil and Political Rights.[17] The individual's right to personal liberty is indeed one of the pillars for the enjoyment of fundamental rights and freedoms under the Bill of Rights. It must not be taken away from any person wthout lawful cause.

The Constitutional protection, however, contains ten exceptions which are fortified by Acts of Parliament. A person can by law be deprived of his or her personal liberty, for example, in the process of executing a sentence or order of the Court. Personal liberty could also be denied to a person in

a civil matter. For example, an arrest under the Debtor's Act.[18] Under this Act, a Court may commit to prison for a term not exceeding six weeks, any person who makes default in paying any judgment debt due to the creditor.[19]

Furthermore, under the Emergency Powers Act, the Preservation of Public Security Act or the Immigration and Deportation Act, personal liberties can be denied or restricted. And, whenever there is an emergency proclamation in force, the President is empowered to make regulations for detaining persons or restricting their movements.[20] Similarly, during any period when a declaration is made for the Preservation of Public Security, the President is empowered to regulate or restrict assemblies or movements of persons in parts or the whole of the country.[21]

Persons of unsound mind, alcoholics, drug addicts, vagabonds and rogues can be denied their personal liberties under various Acts of Parliament. For example, under the Mental Disorders Act,[22] an officer, which the Act defines as Administrative Officer, a police officer or a district messenger, can apprehend a suspected mentally disordered person without warrant and convey that person to hospital, to prison or to other suitable place before an inquiry is instituted by the

Court.[23] Under the Penal Code provision is made for the President to detain a person indefinitely in lieu of a death sentence imposed by a Court. This is known as being detained at the President's pleasure.[24] Such indefinite detentions are certainly in conflict with the constitutional guarantees of the right to personal liberties even though derogations are permitted under Article 13 of the Constitution.

The proclamation of a state of emergency introduces laws which empower the relevant authorities to detain people for long periods without trial. Under a state of emergency the President is empowered to make emergency regulations which can have effect notwithstanding anything inconsistent therewith contained in any enactment.[25] So, if under normal circumstances a person detained is required to appear before a competent Court within twenty four hours,[26] that period can be ignored by the detaining authority by making emergency regulations which permit indefinite detention.[27] Unfortunately, such statutory inroads provide justification for the deprivation of liberty indefinitely.

While the Constitution permits personal liberties to be denied or restricted under certain laws, it also provides safeguards to ensure that the detaining authority does not

abuse its power. For example, Article 26(1) provides that a detained person shall:-

> (a) .....as soon as reasonably practicable and in any case not more than fourteen days after the commencement of his detention or restriction, be furnished with a statement in writing in a language he understands specifying in detail the grounds upon which he is restricted or detained;
>
> (b) not more than fourteen days after the commencement of his restriction or detention a notification shall be published in the Gazette stating that he has been restricted or detained and giving particulars of the place of detention and the provision of law under which his restriction or detention is authorised;

The Constitution also provides for compensation for any person who is unlawfully arrested or detained.[28] In practice, however, compensation claims are often difficult and expensive to litigate.

Serious violations of human rights are notoriously prevalent in the areas of personal liberty under states of

emergency or under the Preservation of Public Security Regulations. In the early case of **William Muzala Chipango,**[29] Chipango was detained as a result of a Presidential Order made under Regulation 31(A) of the Preservation of Public Security Regulations. The grounds for his detention, which should have been furnished within fourteen days of his detention, were furnished sixteen days later.

A Government Gazette Notice which should have been published within four weeks of his detention was published seven weeks later. Upon his petition in the High Court, Mr. Justice Annel Silungwe, as he then was, ordered his release when he held that the detention had become illegal for non-compliance with the mandatory provisions. The trial Court was of the view that the individual's right to personal liberty was one of the pillars of the fundamental rights and freedoms enshrined in the Constitution of the land.

The Attorney-General appealed to the Court of Appeal (now Supreme Court) arguing that failure to comply with the requirements of the Regulation could not invalidate the detention order. The Appeal Court disagreed with the Attorney-General's submission. Chief Justice Doyle, sitting with

justices Pickett and Gardner emphasised the necessity for safeguarding the rights and liberties of the common man.

The learned Chief Justice held that the condition in paragraph (b) of the then Section 26A(1) of the Constitution requiring publication of the detention in the Gazette and furnishing of the grounds upon which a person is detained, were not merely procedural steps in the furtherance of considering a detainee's case but that they went vitally to the fact of detention. The provision had to be strictly adhered to in order to validate the detention.[30] Mr. Justice Gardner added that there was no provision under the Constitution for extension of time within which to carry out mandatory obligations by the State.[31] The Attorney-General's appeal was dismissed accordingly.

Two years later, **Kawimbe** was detained under the same Regulation 31(A) of the Preservation of Public Security Regulation. Similarities about furnishing him with grounds of detention and Government Gazette Notices surfaced as was the case with Chipango. The Supreme Court re-visited the issues of personal liberties in the Kawimbe case. It was another case of unlawful detention. Kawimbe was deprived of his right to

liberty for sixteen days when he was confined to a prison cell for that period.

Chief Justice Doyle sitting with Deputy Chief Justice Baron and Justice Gardner re-iterated the Court's stance that the right to personal liberty was a fundamental human right which must never be taken away from a person without lawful cause. In the Court below, the Deputy Registrar awarded Kawimbe K50 as general damages for his detention. On appeal to the Supreme Court by Kawimbe, Deputy Chief Justice Baron who delivered the Court's majority judgment said:-

> In my view to award K50 as compensation for the deprivation of liberty for two days (sic) by confining the person in prison for that period borders on the contemptuous. Certainly I consider it to be totally inadequate as a measure of the value of the precious right to liberty.[32]

The Court awarded Kawimbe K200 for the deprivation of his liberty. In 1974 K50 was equivalent to twenty five British pounds which would today be equivalent to K80,000.

The Chief Justice, while agreeing in principle about "the very precious right to liberty", dissented in respect of the award. He was of the opinion that K50 was adequate in view of Zambia's economic conditions at that time. The learned Chief Justice opined that he saw nothing contemptuous nor erroneous in the award of K50 which represented the lowest level of employment, almost two months' wages.[33] It is regrettable that the learned Chief Justice concentrated on the economic conditions then prevailing in Zambia without considering the injury to reputation and anxiety suffered by Kawimbe during his detention.

In the case of **Dr. Eleftheriadis**, the appellant appealed from a decision of the High Court refusing an application for the issue of a writ of Habeas Corpus. The appellant was detained by the President under the Preservation of Public Security Regulations and the statement of grounds for which he was detained was served on him within the stipulated time. The question before the Supreme Court was whether the grounds of detention were within the powers conferred on the detaining authority by the relevant Regulation.[34] Counsel for the Appellant argued that the grounds for detaining his client showed that the detention related to an alleged past offence which had nothing to do

with safeguarding public security at the material time. He further argued that the detention was clearly punitive.[35] Counsel for the state argued that although the grounds of detention referred to past activities of the appellant, it was assumed that there was some apprehension in the mind of the detaining authority in respect of future activities of the detainee which could be prejudicial to public security.

The Supreme Court made it clear that it could not question the discretion of the detaining authority if such discretion is exercised within the powers conferred under the relevant Regulation. On the material facts before it, the Supreme Court found that the detaining authority did not prove that the country's future public security was threatened by the previous crime alleged to have been committed by the detainee. The Court quite rightly ordered the writ of habeas corpus to issue.

In **Re Seegers** the High court ruling followed the Supreme Court ruling in **Chipango's** case that strict compliance with the relevant constitutional provisions was absolutely essential to safeguard personal liberties. Seegers was arrested by a Senior Suprintendent of Police and detained under the Presservation of Public Security Regulations.

Grounds for his detention were not furnished within the stipulated period.

Mr. Justice Cullinan held that since no such grounds were furnished, the continued detention of Seegers after 14 days was illegal and contrary to the provisions of Article 27(1)(a) of the Constitution.[36]

In **Joyce Banda v The Attorney-General** the Supreme Court held, inter alia, that the obligation to justify a deprivation of personal liberty is a common law obligation which is not affected by statutory inroads into the right to liberty. But if properly invoked the Statutory inroads constitute the justification. The Court further held that the release of a detainee does not exculpate the person responsible for the detention if its lawfulness is challenged.

The facts of the case were that **Joyce Banda** was arrested and detained under the provisions of the Public Security Regulations. No grounds for her detention were furnished during or after her detention. She was released from detention before the stipulated period of 14 days. The Attorney-General argued that since she was released before the expiry of the stipulated period there was no obligation on

the part of the detaining authority to furnish her with grounds for detention. The Supreme Court found that **Banda** was falsely imprisoned and sent the matter back to the trial judge for assessment of damages.[37]

In **Re Alice Lenshina Mulenga,** the petitioner was detained in May, 1970 under the Preservation of Public Security Regulations. She was leader of a fanatic religious Sect known as the **Lumpas** which was established in Chinsali, Northern Province in 1954, some ten years before Zambia's independence. At independence time the Lumpas began to clash with Kenneth Kaunda's political followers, causing intermittent disturbances in the Northern part of the country.[38]

Lenshina remained in detention from 1970 until May, 1973 when she petitioned for her release. The applicant moved the Court that her constitutional right to a review of her case was denied even though she had requested for it in accordance with the prevailing laws of the country. She also moved the Court that she was detained in a place which was not authorised for detentions as provided under the relevant Regulation. She applied for a writ of **habeas corpus ad subjiciendum** before Mr. Justice Cullinan, then of the High

Court. On the question of review, the learned trial judge held that that was for the review tribunal to consider the petitioner's application as provided under the Preservation of Public Security Regulations. On the second ground that the petitioner was detained in an unauthorised place, the learned judge held in her favour. Following the Supreme Court ruling in **Chipango**, the judge opined that the test was one of strict compliance with constitutional provisions. On the facts before it, the Court declared that Lenshina had not been in lawful custody and ordered her release.[39]

The learned judge was particularly courageous in finding against the State in a matter of this nature bearing in mind the extreme tense atmosphere which prevailed in the country during the Lumpa uprising.

In Re Chiluba, the applicant Frederick Jacob Titus Chiluba was detained in August 1981 under the Preservation of Public Security Regulations on the ground that he addressed meetings at certain places where he advocated a change of Government in the country. He challenged his detention alleging that the grounds given by the detaining authority were fabrications. The applicant was seeking a writ of **habeas corpus**.

Mr. Justice Moodley at the High Court at Ndola followed the reasoning in the earlier cases discussed above. On the facts before it, the Court held that the applicant did not engage in activities prejudicial to public security and granted the application sought.[40]

All the eight cases discussed above took place in the period before the Third Republic. During that period the country was in a perpetual state of emergency, hence the rampant use of the Preservation of Public Security Regulations. These cases, which were selected on the basis of frequency of violations of personal liberties demonstrate a determination by the Court to uphold the right to personal liberty as enshrined in the country's Constitution.

As earlier discussed, the advent of the Third Republic and the return to multi-party politics promised democratic governance and respect for human rights. However, it did not take long before the new Government had to exercise its power under a state of emergency which, hitherto, appeared obsolete.

In early March, 1993, exactly seventeen months after sweeping the Presidential and Parliamentary elections in October, 1991, the MMD Government declared a state of emergency in response to the so-called "Zero Option" threat, allegedly by the opposition UNIP.[41] Over twenty senior members of UNIP were arrested and detained. Some of them remained incacerated without trial for six weeks. When the trial started, it became obvious that the prosecution would not succeed due to a number of procedural technicalities which were not observed by the arresting authority. All the detainees had their detention orders revoked before the trial ended. Some were, however, immediately re-arrested on charges of sedition or misprison of treason. The revocation of the detention orders prompted at least two of the released detainees, Rupiah Banda and Stephen Moyo, to institute legal proceedings against the State for unlawful detention.

In **Rupiah Banda and Steven Moyo,** the petitioners were among those arrested and detained in the Zero Option case. They petitioned the Court for a declaration that the acts of the state resulting in their continuous detention without charges or trial from 5th March, 1993 to 24th April, 1993 were unlawful and were a violation of their rights to personal liberty.

The petitioners were detained for allegedly participating in the preparation and dissemination to members of UNIP and other persons, a document entitled 'Zero Option' whose contents were allegedly intended to overthrow the Government. The petitioners also contended that the Regulations under which they were detained were not ratified by Parliamentt as provided by law.

Upon considering the facts before him, the learned trial judge, Mr. Justice Sifanu of the High Court at Lusaka, held that there were no Regulations upon which the two petitioners could have been lawfully detained since Parliament did not ratify any regulations for their detention. It is submitted that Mr. Justice Sifanu was courageous in upholding the precious right to liberty.[42] The state appealed to the Supreme Court whose decision is not yet known.

The March 1993 state of emergency was lifted in June the same year but a second state of emergency was declared on 29th October, 1997 after the failed coup of 28th October, 1997.[43] Over 100 people were arrested and detained. The trial is still on for about 70 of them. The emergency itself was lifted in March, 1998, some five months later. There is no doubt that States of emergency always curtail the enjoyment

of personal liberties for citizen. Thy also create conditions for law enforcement agencies to flout human rights with impunity.

Unfortunately, when it comes to attempts to challenge the validity of a declared state of emergency, the High Court has persistently held that it has no jurisdiction to enquire into the reasons for such a declaration. The President's discretion is said to be sacrosanct provided he consults his cabinet before proclaiming a state of emergency.

In 1997, **Dean Mung'omba**, the applicant who is the President of the Zambia Democratic Congress (ZDC) was arrested and detained under the Preservation of Public Security Regulations in the aftermath of the abortive October, 1997 coup. He applied for a writ of **habeas corpus** arguing that the President had abused his powers in declaring a state of emergency since the facts on the ground did not support such a declaration. Additionally, he argued that the detaining authority did not adduce evidence for his detention.

In dimissing Mung'omba's application, Mr. Justice Kabalata held that the Court had no jurisdiction to enquire into grounds for the declaration of a state of emergency by the

President. The Court noted that such a role was left to Parliament when the proclamation is put before it for approval.[44] Justice Kabalata's ruling was most unfortunate in that a golden opportunity was missed for the Court to assert its role in the protection and promotion of human rights in the country.

Surely, it cannot be said to be beyond the jurisdiction of the Court to enquire into the validity of a declaration of a state of emergency if Zambia's Bill of Rights is to be brought in line with international human rights standards. The South African constitution provides that any competent Court may decide on a declaration of a state of emergency.[45]

Although the Courts have betrayed their unwillingness or inability to enquire into a Presidential declaration of a state of emergency, they have continued to show their desire to protect personal liberties. In **Fred Mmembe and Bright Mwape**, the two editors and a columist of **The Post**, a newspaper known for its open criticism of the Government, were charged and convicted of contempt of Parliament by the National Assembly itself. **The Post** had criticised the Vice-President and other members of Parliament for attacking the Supreme Court after its landmark judgement declaring Section

5 of the Public Order Act unconstitutional. After spending some time in hiding, the two editors surrendered themselves to the National Assembly. They were imprisoned while the columist, Lucy Banda Sichone, remained in hiding.

The editors applied for issue of a writ of **habeas corpus.** They were successful. Mr. Justice Chanda of the High Court at Lusaka ordered their release and held that the Zambian Parliament was not a Court of law in any judicial sense.[46] However, Justice Chanda's judgement does not appear to address fully the question of whether the Zambian Parliament had power to send the editor to prison. In summarising his "holdings" the judge contradicts his earlier pronouncement that Parliament was not a Court when he says in paragraph 4 as follows:-

> 4. That although it is not a Court our Parliament has power to punish for contempt, which power is inherent in the nature of its status to preserve its dignity and honour. In my view, this power includes the common law power to imprison, and not only to reprimand as other lawyers think[47]

Under the National Assembly (Powers and Privileges) Act, any person shall be guilty of an offence who, inter alia,

commits any act of intentional disrepect to or with reference to the proceedings of the Assembly or a Committee of the Assembly or any person presiding at such proceedings.[48] The Act also provides that for an offence under the Act for which no other penalty is provided, as in the instant case, the offender shall be liable on conviction to a fine not exceeding one hundred kwacha or to imprisonment with or without hard labour for a term not exceeding three months or both such fine and imprisonment.[49]

The question, however, is who institutes proceedings against the alleged contemner and who adjudicates over the issue? In the Mmembe and Mwape case the National Assembly acted as prosecutor and judge unto its own cause prompting Judge Chanda to comment that the Zambian Parliament is not a Court of law.

Against this background it is noteworthy to observe that Article 14(1) of the International Covenant on Civil and Political Rights provides that in the determination of any criminal charge against him, everyone shall be entitled to a fair and public hearing before a competent, **independent** and **impartial** tribunal established by law. The emphasis on **independent** and **impartial** is the writer's. So, the National

Assembly could not be a judge in its own cause if bias was to be avoided.

In analysing these cases it can not be denied that Courts are mindful and concerned about personal liberties of the individual as being the cornerstone of the country's Bill of Rights. Presumably, this is because although the cases are usually politically sensitive, the interpretation of the relevant regulations pertaining to time limit and grounds of detention are relatively straight foward. But when interpreting the more complicated issues of Presidential powers vis-a-vis state of emergency, Courts are still timid.

(B) Freedom of Expression

The Zambian Bill of Rights provides that except with his own consent no person shall be hindered in the enjoyment of his or her freedom of expression. Freedom of expression includes freedom to hold opinions, to receive ideas or information, to impart or communicate ideas whether to the public or to an individual or group of individuals.[50] These provisions are identical to those found in Article 19 of the Universal Declaration of Human Rights. The Constitution

further provides that no law shall make any provision for derogation from freedom of the press.[51]

In neighbouring South Africa the Bill of Rights is very specific about the relationship between freedom of expression and the press. There, freedom of expression includes "freedom of press and other media".[52] The Namibian Bill of Rights adds "freedom of speech" to freedom of expression and the press and other media.[53]

The Zambian Constitution provides for exceptions so as to limit the said freedom of expression in the interest of defence, public order and to protect the reputation of others. Limitations can also be imposed if they are reasonably justifiable in a democratic society. In consequence thereof, the Zambian legilators have put in place various Acts of Parliament to curb what they perceive to be a likelihood of an **open sesame** for slander or libel.

The Penal Code has thus criminalised a number of acts which could fall within the purview of freedom of expression. South Africa and Namibia have also provided for certain exceptions but not as wide as those under the Zambian Bill of Rights.[54] Article 9 of the African Charter on Human and

People's Rights to which Zambia is a signatory provides for the right of every individual to receive, express and disseminate opinions within the law.

One of the earliest cases concerning freedom of expression was the **Mainza Chona Case**.[55] Mr. Chona who was then National Secretary of the United National Independence Party UNIP had distributed a document in November, 1961, whose general thrust was about the evils of colonial rule. He was arrested, charged and convicted of publishing seditious material. The seditious material was actually a press statement which was not widely publicized. Section 62 of the Penal Code defines sedition so widely that literally any criticism would fall under the armbit of sedition. The Court held that the sedition was "grave" because of its inciting overtones against colonial rule. He was sentenced to six months imprisonment which was suspended for three years. The case was tried by Chief Justice Diarmaid Conroy.

It is interesting to note that the learned Chief Justice imposed a suspension of three years on a six months' sentence as opposed to the normal period of one year stipulated under the Criminal Procedure Code.[56] Presumably, it was done to ensure good behaviour by Mr. Chona for at least three years.

By the time the suspension period ended, Zambia had attained its independence from its colonial masters with Mr. Chona still a high ranking offical of UNIP.

Limitation on freedom of expression are also contained in the defamation Act [57] and the common law tort.

In **Cobbett-Tribe** the court was faced with a libel case in which the Vice-President of the then the Law Society of Zambia (now the Law Association of Zambia) issued a statement urging the Government to bring to trial persons detained under the Preservation of Public Security Regulations. The Zambia Daily Mail, a Government controlled newspaper, published material imputing professional dishonesty to the Plaintiff and members of the Council of the Law Society. The Council sued the newspaper for libel.

The Court held that the defence of fair comment was not available to the defendant. In addition to aggravated damages in the sum of K2,000 it awarded the Plaintiff K750 by way of exemplary damages to bring home the newspaper's duty to verify facts before publishing them" especially where the newspaper fails to apologise and to make amends for

publishing untrue statements as what happened in the instant case.[58]

The Cobbet-Tribe era also provided an interesting scenario for the tort of defamation and freedom of expression. The **Simon Kapwepwe Case** provided that scenario in the 1970s. Both the High Court and the Supreme Court dealt with a series of defamation actions instituted against the Times of Zambia and the Zambia Daily Mail between 1971 and 1978. The various libel actions concerned serious allegations published against Mr. Kapwepwe, a former Vice-President of the Republic of Zambia. In one allegation, he was accused of conducting military training in guerrilla warfare by sending Zambians to Angola for such training. In another allegation, styled " the cartoon case" by the Supreme Court, he was depicted as receiving money from the then apartheid regime of South Africa. In yet another allegation he was depicted as a Bemba tribalist.

The Supreme Court took a very serious and concerned view of the various libels. The Court held that the libels "were very serious .... and were a conscious attack of the most serious kind in quite extreme language". In one such case, damages of K6,000 awarded in the court below were

increased to K15,000. In another, exemplary damages of K20,000 were awarded.[59]

The advent of multi-party politics in the 1990s introduced more freedom of expression than in the Second Republic although the State has shown some intolerance against the independent media. Many independent mass media entered the centre stage in exercising their freedom of expression and speech. Notable among them were the **Post Newpaper** and the **Crime News**. In particular, the Post Newpaper has been relentlesly in the forefront of what is now commonly referred to as investigative journalism. In its quest to play such a role the **Post** and its editors and reporters have not been spared the wrath of those upon whose toes the Newspaper has allegedly stepped.

In **Michael Chilufya Sata,** three libel actions were brought against the Post Newspapers Limited, two of which commenced in 1992 and one in 1993. Various articles were published by the Defendants imputing or alleging moral turpitude in Sata's public life and public offices.

The Chief Justice, Ngulube sitting as a single judge of the High Court in the **Sata** case, acknowledged the growing

movement of international human rights norms and assistance that could be derived from them in the interpretation of domestic law in domestic litigations. The learned Chief Justice also acknowledged the need to give:-

> to the constitutional provision in Article 20 and accept that impersonal criticism of public conduct leading to injury to official reputation should generally not attract liability if there is no actual malice and even if the truth of all facts alleged is not established if the imputation complained of is competent on the remainder of the facts actually proved.[60]

The Chief Justice further observed that the trick was to balance the competing rights and freedoms, and the application of the existing law in more imaginative and innovative way in order to meet the requirements of an open and democratic new Zambia.[61] The learned Chief Justice awarded compensatory damages in what can be described as a modest sum of one millon kwacha for the two actions and costs against the defendants.

However, the awarding of costs can have a chilling effect which could inhibit free discussion on the conduct of

public officials. Newspapers which perform a public duty by commenting on public officials make significant contribution toward good and transparent democratic governance. In view of what the Court said about seeking to promote freedom of expression especially on issues of public interest, it should not have awarded costs against the defendants.

In the totality of the judgement, however, it can be safely said that it was a landmark decision in this area of human rights. It laid down some important guidelines on freedom of expression. For example, the Court was of the view that any excessive awards in libel matters affecting political public figures would inhibit free debate on matters of public interest.[62]

Apart from costly civil suits, freedom of expression is also restricted by the Penal Code under which defamation of the President, publication of false news and even defamation of foreign princes are made criminal offences.[63] The criminalisation of defamation has a chilling effect on honest journalists because of the prospect of being jailed. In **Fred Mmembe, Bright Mwape and Masautso Phiri** the **Post** editor and reporter, were charged with defaming the President contrary to Section 69 of the Penal Code. A person

convicted under this Section is liable to imprisonment for a maximum period of three years.

In the Subordinate Court the accused persons raised the issue of the constitutionality of Section 69. In accordance with the provision of the Constitution, the Court referred the question to the High Court.[64] In the High Court the learned trial judge Chitengi conceded that the petitioners had proved that their freedom of expression guaranteed under the Constitution was impeded. He, however, opined that it was reasonably required in the interest of defence, public safety and public order. And that it was also reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons.

The petitioners then appealed to the Supreme Court, which upheld the ruling of the Court below. The appellants were sent back to the Subordinate Court for trial. Chief Justice Ngulube sitting with judges Sakala and Chaila emphasised that the central executive authority should not be reduced to common ranks. The Court was of the view that any person elected to the office of President was not an ordinary citizen.

The Court further emphasised that the executive power of the State vested in the Presidency and that the President was endowed with various matters, powers and functions which were described in the Constitution. The Court could not therefore see how it could ever be argued that the President could stand equally before the law with the rest of the common citizens.

The Court fortified its opinion by pointing to Article 43 which grants the President immunity from civil and criminal suits while he occupies that high office. If the Constitution itself makes the President not equal to everyone else, the Supreme Court could not see how the arguments of the appellants could be upheld.[65]

It is interesting to note that this judgment was delivered shortly after the Court had struck down Section 5(4) of the Public Order Act as being unconstitutional resulting in the Court being severely attacked by some members of Parliament.[66] Consequently, Parliament amended the Public Order Act claiming that it was doing so to avoid anarchy.[67]

The surprising point about this appeal is that the Supreme Court took a prosecutorial stance by emphasizing the special status of the Republican President when in fact the appellants were still to be tried by the Subordinate Court. By its pronouncements the Supreme Court was literally telling the Subordinate Court to do the needful against the accused persons. The outcome of the trial in the Subordinate Court is not yet known.

In **The People v Fred Mmembe** the President had declared issue number 401, of the **Post** Newspaper in February, 1996, a prohibited publication under the Penal Code[68] because it contained an article about Government's intention to hold a referendum relating to a proposed revised Constitution. Initially, the journalists responsible for the article were charged under the State Security Act.[69] When the case went to Court the charge under the Penal Code was withdrawn but the charge under the State Security Act remained. Presumably, this was due to the fact that stiff penalties are prescribed under the State Security Act.

In the High Court, Mr. Justice Chitengi held that the accused persons had no case to answer on the basis that the essential element of knowledge or reasonable belief that the

document was classified was not proved by the prosecution.[70] The learned trial judge also held that he saw nothing in the so-called classified document which could endanger the security of the state. He further opined that it is not everything that is declared a classified which could also qualify as classified material under the State Security Act. This was a well-reasoned judgment. It brought out the salient point that restrictions on freedom of expression must be for a genuine and legitimate purpose of securing national security.[71]

C. Freedom of Assembly and Association

The right to freedom of assembly and association is enshrined in Article 21 of the Constitution. As has been pointed out in the previous Chapter, the Article provides that except with his or her consent no person shall be hindered in the enjoyment of the freedom of assembly and association. This freedom includes the freedom to belong or to form any political party, trade union or any other association for the protection of one's interest. A similar provision is

found in Article 20 of the Universal Declaration of Human Rights where it is stated that:

> Everyone has the right to freedom of peaceful assembly and association..... No one may be compelled to belong to an association.

Article 10 of the African Charter on Human and People's Rights has a simalar provision.

The Zamban Article in the Bill of Rights, however, contains the usual derogations. The exceptions are that nothing done under the authority of any law in the country shall be held to be inconsistent or in contravention of the provisions of the said Article 21. These include the interest of defence, public safety, public order, morality or public health. They also include the protection of the rights and freedoms of other people and the general blanket derogations provided they are shown to be reasonably required or justifiable in a democratic society. [72]

In line with other constitutional derogations, a number of Statutes or Acts of Parliament have been put in place to take care of the exceptions. For freedom of assembly and association, the major Statute is the Public Order Act followed

by the Emergency Powers Act and the Preservation of Public Security Act as read with the relevant Regulation. The Immigration and Deportation Act is also used to restrict freedom of association as was the case with **William Banda and John Chinula** whose strong association with the opposition UNIP was perceived as inimical to the ruling MMD Government. [73]

There are provisions limiting freedom of association and assembly if the limitations are reasonably required in the interest of defence, public, safety or public order. The limitations are also justified if they are reasonably required for the purpose of protecting the rights and freedoms of other persons.[74]

Some of the interesting cases in the area of freedom of assembly and association will now be discussed. **The Feliya Kachasu** case was one of the early cases where the Petitioner was alleging that her freedom of conscience and **association** was infringed. Feliya Kachasu, a young girl aged about twelve years was brought up as a Jehovah's witness. She refused to sing the National Anthem at School and was suspended from school. She applied for redress through her father Paul Kachasu, under Article 28 of the Constitution. Chief Justice

Blagden sat as a judge of the High Court. The learned Chief Justice came down in favour of the state saying that the school regulations which resulted in the applicant's suspension were "reasonably justifiable in a democratic society" which existed in Zambia.

The Court found as a fact that the applicant had suffered some hindrance in the enjoyment of her freedom of conscience and **association** because she had been compelled to sing the National Anthem at her school contrary to her religious beliefs as a member of the Watchtower sect. The Court also found that she had been suspended from school and denied her readmission as a result of her refusal to sing the National Anthem or salute the National Flag. Despite these findings which were obviously violations of her human rights, the Court proceeded to pronounce that such hinderance did not violate the applicant's right to the enjoyment of her freedom of conscience as secured by the then Article 21 of the Constitution.

The Court was also of the view that the regulations under the Education Act of 1966 which were invoked against Kachasu by the School authorities were reasonably justifiable in a democratic society.

The Court concluded that the regulations were also reasonably required for the purpose of protecting the rights and freedoms of ther persons. The Court also held that in the interest of the security of the State, the individual's right to freedom of conscience or association can be curtailed.[75] It is hard to see how the refusal by one pupil to sing the National Anthem could infringe upon the rights and freedoms of "other persons". The learned Chief Justice obviously leaned in favour of the State presumably, because at the time the issue of Jehovah's witnesses was politically sensitive.

In **Harry Mwaanga Nkumbula**, the Petitioner then a member of Parliament and leader of a political party known as the African National Congress (ANC), applied under Article 28 of the Constitution for redress on the grounds that his fundamental rights relating to freedom of association were likely to be hindered in that under the proposed one-party constitution, the rights which existed would no longer continue to be guaranteed. He then sought, inter alia, a declaration that the proposed introduction of one-party state which the President had announced on 25th February, 1972, was contrary to the rights guaranteed in the Constitution of Zambia.[76]

The President had appointed a Commission of Inquiry under the Inquiries Act [77] to inquire into the **mechanics** of introducing a one-party democracy. The function of the Commission was not to inquire into the **desirability** of introducing a one-party state. [78]That, apparently, was already decided. The emphasis on **mechanics** and **desirability** is that of the writer.

At first instance, Chief Justice Doyle dealt with the Petition sitting as a judge of the High Court. While conceding that the then Article 23 which guaranteed freedom of assembly and association would be violated by introducing a one-party state, the learned Chief Justice nevertheless found against the applicant. He held that the application could not be entertained because Article 29(5) of the then constitution prohibited petitions if the alleged contravention was in respect of the contents of a bill which had not yet become law.

The Petitioner appealed to the then Court of Appeal, now the Supreme Court. The Court held, inter alia, that the enforcement Article 28(1) of the Constitution had no application to proposed legislation of any kind but that it only applied to executive or administrative action or "exceptionally,

action by a private individual." [79] To this, the Court added the principle of **locus standi** before an individual could seek redress because the infringement or threatened violation must be in relation to that individual not the public at large. [80]

There appears to be some contradiction between the enforcement provisions under Article 28(1) and Article 28 (3). Article 28(1) states that:-

> if any person alleges that any of the provisions of Articles 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress to the High Court.....

Article 28 (3) states that:-

> An application shall not be brought under clause (1) on the ground that the provisions of Articles 11 to 26 (inclusive) are likely to be contravened by reason of proposals contained in any bill which, at the date of application, has not become law.

The mischief in these two provisions lies in the use of the word "likely". It is difficult to reconcile the use of the word "likely" in the two clauses of the same Article. In Nkumbula's case, his argument was that the proposed or "likely" introduction of a one-party state would deprive him of his right to freedom of assembly and association. In this case he even had the **locus standi** in that the "likely" infringement would affect his enjoyment of free assembly and association, namely belonging to a political party of his choice.

It is, therefore, submitted that both the High Court and on appeal, the Court of Appeal were walking on a tight rope due to the political factors involved in the Government decision to establish a one-party state in Zambia. The learned Judge-President of the Court of Appeal observed that the case and issues raised thereby were of considerable importance and had given rise to very wide public interest. [81] The issue of introducing a one-party state was admittedly, politically volatile at the material time.

In the **William Banda** case ten years later, after the High Court at Chipata declared him an illegal immigrant, he appealed to the Supreme Court. While his appeal was pending,

he returned to his residence in Lusaka and continued to be an active member of the United National Independence Party. During that time his party applied for police permits to hold public rallies but whenever his name appeared on the list of speakers, it was deleted by the police. Banda petitioned against the Attorney-General arguing that his freedoms of expression and assembly were infringed. The State argued that Banda was a non-Zambian and that his previous speeches tended to be provocative.

The Court found in favour of Banda and Mr. Justice Chitoshi in a well-researched and reasoned judgement held that indeed his freedom of expression and assembly had been violated despite being allegedly non-Zambian at the material time. [82] There is no provision in the Constitution or in any other law which prohibits a non-Zambian from enjoying freedom of assembly or association. In the instant case, judge Chitoshi declared that denying Banda a permit because he was a non-Zambian was an irrelevant issue because it violated the Constitution.

In the **Alfred Mthakati Zulu** case the Petititioner sought a declaration from the High Court that the cancellation of a police permit earlier obtained by the Univerity of Zambia

student to hold a rally was a violation of the contitutional freedom of speech and assembly of the students concerned. The permit was issued on 21st September 1992, but was cancelled the following day allegedly, on the instructions of a superior officer who commanded the Regulating Officer to do so.

The then provisions of the Public Order Act provided that:-

> Any person who wishes to convene an assembly, public meeting or to form a procession in any public place shall first make application in that behalf to the regulating Officer of the area concerned, and, if such assembly, public meeting or procession is unlikely to cause or lead to a breach of the peace, he shall issue a permit in writing authorising such assembly, public meeting or procession...[83]

The Commissioner of Police was empowered to appoint by name or office any police officer of or above the rank of Assistant Inspector to be the regulating officer for purposes of regulating assemblies, public meetings or processions in any area under the Act. [84] The applicants contended that the

Regulating Officer concerned was the only person authorised to change or cancel the permit and should not have been dictated to by his superior officer. The trial Judge, Mr. Justice Kabazo Chanda, disagreed and held that there had been no violation of the fundamental rights of the students concerned. The applicant appealed to the Supreme Court.

The Supreme Court held that the superior officer was fully entitled to give orders to the Regulating Officer about the issuing, variation or cancellation of permits. The Court saw no impropriety on the part of the police and held that the cancellation or variation of the permit was valid at law. [85]

In this case both the High Court and the Supreme Court showed no appreciation whatsoever for the fundamental human rights and freedoms guaranteed by the Zambian Constitution. Both Courts paid no attention to the discretionary powers of Regulating Officers in granting permits. Judge Chanda never even bothered to look at Judge Chitoshi's well researched judgement which was delivered just before the Alfred Zulu case. Surprisingly, the Supreme Court too (Gardner, Chaila and Chirwa) fell into the same trough. The Court limited itself to a narrow interpretation of the law. The Supreme Court even refused to consider compensating the

Students Union for expenses incurred in advertising the approved but aborted rally.

The **William Banda** and **Alfred Zulu** cases took place soon after the advent of the Third Republic. During the last years of the Second Republic, however, members of a political pressure group which eventually formed the Movement for Multi-party Democracy (MMD) were frequently denied permits to hold assemblies or public rallies. It took the late **Arthur Wina** and six members of his pressure group, which included Mr. Fredrick Chiluba, to petition the Court for redress. They alleged that their fundamental rights of assembly, association and expression were being violated by Police refusals to issue them with permits. The matter went before Mr. Justice Bobby Bwalya of the High Court at Lusaka. [86] A further allegation was that the Regulating Officers in Lusaka and Ndola were receiving instructions from their superior officers not to grant permits to the MMD.

The Court held that on the facts before it, the MMD was denied its fundamental rights of assembly, association and expression. The Court also held that Regulating Officers had surrended their discretionary power of granting permits by accepting orders from their superior officers not to grant such

permits to the MMD. It is noteworthy that this was an important issue in the Alfred Zulu case which the Supreme Court failed or ignored to appreciate.

The stand taken by the Supreme Court in the Christine **Mulundika Case** in 1995, however, is of great significance. The eight appellants had been arrested for holding a public rally without a police permit contrary to Section of the Public Order Act. They challenged the constitutionality of some provisions of the Act, in particular Section 5(4) which required them to obtain a police permit before holding their rally. They did not obtain such permit and they were charged with a criminal offence of holding a public meeting without a police permit.

Using the provisions of Article 28(2) (a), the accused persons requested the trial Magistrate to refer the matter to the High Court for determination in view of the Constitutional issues they had raised. Mr Justice David Lewanika, then a High Court Judge, found against the accused persons, holding that to declare the requirements for a police permit before such a rally could take place as unconstitutional could create a vaccum in law and would promote anarchy in the country.

Accepting the limitations contained in the derogations to Article 21(2) of the Constitution in respect of freedom of assembly and association, the learned trial judge held that such limitations or restrictions as are contained in the Public Order Act were reasonably justifiable in the interests of defence and public order. [87]

Judge Lewanika was concerned with the possibility of creating a vaccum and thereby promote anarchy in the country. Unfortunately, he either did not draw his mind to, or simply ignored the innovative concept of the role of criminal law legislation which his learned brother Justice Chishala Chitoshi propounded in the **William Banda** case supra. In that case, Judge Chitoshi was, quite properly, of the view that the prospects of creating anarchy should not be a fetter to the enjoyment of the right to assembly and association because criminal law provisions are in place. These can be enforced against any trouble-makers.

Mulindika and 7 Others appealed to the Supreme Court against the Judgement of the High Court. The learned Chief Justice who read the majority judgment of three to two posed a momentous question as to:-

> whether in this day and age, with only four years to go to the end of the twentieth century, it is justifiable in a democracy that the citizens of this country can only assemble and speak in public with prior permission which permission is not guaranteed and whether the law under attack is consistent with the guaranteed freedoms of assembly and speech. [88]

The majority Court went on to say:

> The requirement of a prior permit is a left over from the days of her Majesty's Governors and the British themselves do not require permission to assemble and speak. Why should we require it? [89]

In the final analysis the majority Court held that section 5 (4) of the Public Order Act contravened Articles 20 and 21 of the Constitution and was, therefore, unconstitutional. Most well informed quarters hailed the ruling as a landmark judgment. Of the dissenting two judges, the Deputy Chief Justice Bweupe was hospitalied at the material time. Justice Mathew Chaila took the "anarchy" view of Justice Lewanika in the Court below.

An analysis of these cases under freedom of assembly and association indicates a timorous role of the courts. Presumably, because most of the cases are between individuals and the Executive. Ever since independence the Executive in Zambia has been in a much stronger position than any of the other two arms, namely the Legislature and the Judiciary, since after all it is the major appointing authority and paymaster for state employees.

(D) Freedom of Movement

The right to freedom of movement is protected under Article 22 in the Bill of Rights. It is provided therein that a "citizen" shall not be deprived of his or her freedom of movement. This freedom includes the right to move freely throughout Zambia. It also includes the right to reside in any part of Zambia and the right to leave and return to Zambia. Article 13 of the Universal Declaration of Human Rights contains similar provisions and so does Article 12 of the African Charter on Human and People's Rights.

Again, exceptions abound. Restrictions on movement can be imposed in the interest of defence and national security

such as a state of emergency. The days of the **curfews** were days when people's movements could be restricted in time or place. Moreover, non-Zambian citizens do not enjoy automatic freedom of movement.

There has been considerable litigation in the area of freedom of movement both before aand after the return to multi-party politics. Most cases in this area are concerned with deportations under the Immigration and Departation Act or dentetions under the Preservation of Public Security Regulations.

In the early case of **Thixton,** the respondent, a British subject who lived in Zambia, was served with a notice to leave the country in October, 1966 under the Immigration and Deportation Act [90] because he had allegedly become an undesirable person due to his standard or habits of life. The relevant legislation affecting Thixton was the Immigration Act of 1954, which was an enactment of the Federation of Rhodesia and Nyasaland. The Act was subsequently made applicable to Zambia upon attaining independence in 1964.

Under Section 13 of the 1954 Immigration Act, any person domiciled in Northern Rhodesia (now Zambia) who was a citizen of Southern Rhodesia or of the United Kingdom and colonies could not, except under certain circumstances, be declared a prohibited immigrant.[91] The exception was if the Minister or Governor deemed such a person undesirable on economic grounds or on account of the standard or habits of life to be unsuited to the requirement of Northern Rhodesia.[92]

Thixton was statutorily domiciled in Northern Rhodesia and was deemed to be a non-prohibited immigrant until 15th January, 1965, when the Zambian Government amended the Federal Immigration Act of 1954. The amendment deleted the paragraph which protected citizens of Southern Rhodesia or the United Kingdom and its colonies.[93]

Thixton did not want to leave Zambia and he challenged the purported deportation order and sought the Court's declaration that he was not a deportable person within the meaning of the Immigration Act. Secondly, he sought a declaration that the restriction imposed on his movements were null and void and contrary to the provisions of the Constitution. Mr. Justice Whelan at the High Court in Ndola

granted him the declarations and condemned the State in costs. The State appealed.

The Court of Appeal after a lengthy and extensive research, upheld the judgment of the Court below. The Court held that Thixton had "accrued" or "acquired" rights in Zambia and that the repeal of Section 13(1)(e) of the Federal Immigration Act of 1954 did not take away the accrued rights enjoyed by Thixton.[94] These rights according to the Appeal Court were entrenched rights. Chief Justice Blagden sat with Judges Doyle and Evans.

The **ratio decidendi** of the Appeal Court was three-pronged. Firstly, the Court held that because Thixton was a citizen of the United Kingdom he was entitled to enjoy the same privileges which a Zambian citizen would enjoy in the United Kingdom. Secondly, the qualified immunity from deportation which a Zambian citizen enjoyed in the United Kingdom should apply to a United Kingdom citizen resident in Zambia. Thirdly, Thixton had no criminal record upon which he could be declared an undesirable person. The Attorney-General for the State submitted that the **reciprocity** approach would enchroach upon the sovereignity of Zambia but that submission failed to persuade the appellate Court.

The judgment of the Appeal Court was compatible with the provisions of Article 13 of the International Covenant on Civil and Political Rights (ICCPR) which guarantees protection of freedom of movement or residence for aliens lawfully in the territory of a State Party. Unfortunately, the Constitution of Zambia has derogated from this international provision by enacting that it is permissible under laws to restrict the movement of non-Zambian citizens.[95]

In **Paton's** case, Paton's freedom of movement was restricted in similar circumstances to those of Thixton. Like Thixton, Paton was a citizen of the United Kingdom who had been ordinarily resident in Northern Rhodesia from 1951. He was, however, physically removed from Lusaka in 1957, detained and then deportated to Southern Rhodesia now Zimbabwe. Following the decision in Thixton, Paton returned to Zambia and successfully challenged his deportation. His freedom of movement was also restored.[96]

One of the most interesting cases in the Second Republic involving personal deprivation of the freedom of movement was that of **Andrea Sacharia Shipanga**. The appellant was the Information Secretary of the South West African People's Oganisation (SWAPO) who had entered

Zambia lawfully in 1972. He resided in Kabwata and held a United Nations travel document which enabled him to enter, re-enter and remain in Zambia.

When differences arose between Shipanga and the SWAPO leadership, the Government of Zambia took him and his colleagues to a small camp and held them there under armed guard. Shipanga applied to the High Court for a writ of **habea corpus** which was refused on the ground that the applicant was not in detention but was being allowed to live in a separate place for his own protection. He appealed to the the Supreme Court. The Court held that for a person to be deprived of his liberty, it was not necessary that he be in detention or custody. It was sufficient if he was not free to leave the place where he was held. The Court further held that a person could be deprived of his freedom of movement only in accordance with the law. There was no principle of law that allowed a person to be taken into protective custody against his will.[97]

The Attorney-General conceded that the appellant was not physically able to leave the camp save with permission and under escort. Four days before the hearing of the appeal Shipanga was flown to Tanzania. This case was politically

volatile. Despite such a state of affairs, the Supreme Court was courageous enough to allow the appeal albeit in the appellant's absence. The Court ordered the Writ of habeas corpus to issue.

More recently, the Supreme Court considered the restriction and subquent deportation from Zambia of Wiliam Stephen Banda a so-called UNIP stalwart. He was declared an illegal immigrant from neighbouring Malawi. Banda filed a petition against his impending deportation at the High Court in Chipata. The High Court found against him. On appeal to the Supreme Court, the appellate Court also found against him and he was deported. The trial judge Mr. Justice Tamula Kakusa commented that:

> If this Court were empowered to declare persons like the Petitioner to be Zambian; the petitioner would have received a favourable declaration considering his long stay in Zambia and the role he has played[98]

It is submitted that Article 28(1) empowers the Court to make such orders or declarations to secure the enforcement of fundamental rights and freedoms. The Supreme Court was of the view that Banda was an illegal immigrant **ab initio**. No

consideration was given to his long stay in Zambia and the fact that he held a senior job in the Government, that of District Governor. The whole purpose of the petitioner was that he was seeking a declaration from the Court that he was a Zambian either by birth, naturalisation or by established residence. It is submitted that it was within the Court's jurisdiction to declare the petitioner Zambian on any one of the three grounds. [99] Strangely, both the trial and appellate Courts were not prepared to be persuaded by submissions on established residence or accrued rights of residence.

Surprisingly, neither of the Courts paid any attention to international standards on issues of citizenship. Article 15 of the Universal Declaration of Human Rights provides that no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Freedom of movement is one human right which has been grossly violated since the attainment of independence in Zambia. It appears to be a colonial legacy, which the independent State appears to be unwilling to rectify by re-visiting the Bill of Rights or its statutes to bring them in line with international human rights norms.[100]

Section 3: The Courts in a Dilemma

The Zambian judiciary is faced with many legal and practical dilemmas in its task of interpreting, implementing and protecting the rights and freedoms of individuals under its jurisdiction. Like in most nascent democracies, the Zambian judiciary has yet to develop its own body of domestic and international authoritative decisions upon which to draw inspiration in promoting an activist or imaginative human rights culture.

Among many causes of these dilemmas are (a) octopus limitations or derogations in the Bill of Rights; (b) the omnipotence of the Executive arm of government; (c) non-incoporation of ratified human rights instrument into domestic legislation; (d) lack of human rights education or training; and (e) the effect of states of emergency.

A Octopus Derogations

The Constitutional injunction contained in Article 11 makes it very clear that the enjoyment of fundamental rights and freedoms is not limitless. The limitations are designed to ensure that the rights and freedoms enjoyed by one

individual do not prejudice the rights and freedoms of other persons or the public interest. [101] The limitations are also designed to safeguard peace and order. However, their rampant use under states of emergency or under the Preservation of Public Security Regulations is of grave concern to human rights activists. For example, in **Dean Mung'omba's** case, which has already been discussed above, the High Court held that it had no jurisdiction to inquire into the grounds for a declaration of a state of emergency by the President when in fact it could have done so.

There are two levels at which these constitutional limitations or derogations operate. First, they are contained in the Article under fundamental rights and freedoms. They appear as "exceptions" or "provisos" to the guaranteed rights or freedoms. Secondly, the Constitution permits derogations through "any other law" such as under the Emergency Regulations.

B The Omnipotence of the Executive Arm of the State

Since independence, the Judiciary has been discharging its functions under the very powerful eye of a very strong Executive arm of the State. In the First Republic there was a relatively weak opposition in the National Assembly. The

ruling party could literally get away with whatever legislation it needed.

During the period of the Second Republic, Zambia was a one-party state where the authority of the Executive was even more extensive than in the First Republic. Although the Third Republic has returned to multi-party politics, the ruling Movement for Multi-party Democracy (MMD) has such an overwhelming majority in Parliament that it can do almost anything that a one-party state could do.[102] For example, out of 150 seats in Parliament, the MMD won 125 in 1991 Parliamentary elections.[103] The 1996 Parliamentary elections did not improve the situation for the opposition parties especially since the major opposition party, UNIP boycotted the elections.

The effect of this Executive omnipotence is that it is overbearing on the judiciary. In most cases judges have remained timid when faced with adjudication which involves the State. For example, in the case alleging defamation of the President by the Post Editors, **Fred M'membe** and **Bright Mwape**, the Supreme Court went out of its way in describing the difference between the Republican President and the ordinary citizen.[104]

In the **Dean Mung'omba** case, Mr. Justice Kabalata refused to inquire into the reasons for the declaration of a state of emergency by the President.[105] The learned judge erroneously felt that the National Assembly was best suited for that type of inquiry when it should have been the other way round when adjudicating upon human right issues.

It may be hypothesized that the vicious campaigns mounted against the judiciary by some influential members of Parliament who disagreed with some Court judgments had a telling and chilling effect on judges. There were attacks on the judiciary after the **Mulundika**[106] case in 1996. There was another vicious attack on the judiciary by Deputy Foreign Affairs Minister, Valentine Kayope. He told Parliament that Chief Justice Mathew Ngulube and some named Supreme Court and High Court judges mostly from the Eastern part of Zambia were symphathisers of the United National Independence Party (UNIP) led by the former Republican President, Kenneth Kaunda.[107]

It is obvious from the tone of Kayope's attacks that he was actuated by ethnic equations. He referred copiously to former Republican Preident, Kenneth Kaunda. In the Supreme

Court, judges associated with Eastern Province are four out of nine. Those associated with the Northern Province, like Kayope, are three. One is from the Central Province and one from the Southern Province.[108] However, whatever the motives of Kayope's attacks, they seemed to have been designed to intimidate, and to have a debilitating effect on the judiciary in general.

At that time there was a case against Kaunda pending before the High Court at Ndola. The adjudicating judge was from the Eastern Province and one of those mentioned by Kayope as a Kaunda supporter. In the light of the judge's somewhat bizarre judgment in that case, it might be argued that the judge was influenced and even cowed by Kayope's virulent attacks against the Eastern Province judges. It is difficult to avoid linking Kayope's tribal crusade and the judgment declaring Kaunda a stateless person.

In the **Kaunda** case, the applicants, Dr. Remmy Mushota and Patrick Katyoka applied to the High Court at Ndola for **judicial review** alleging that the citizenship granted to Dr. Kenneth Kaunda, the first President of the Republic of Zambia, was illegally and / or irregularly obtained. The Applicants sought a declaration that Dr. Kaunda ruled Zambia illegally and

that he was stateless. To many people's consternation, the Court declared Dr. Kaunda stateless.[109] An appeal to the Supreme Court is pending.

C Domestication of International Human Rights Instruments

Although Zambia has ratified a number of important international human rights instruments, its record of incorporating the provisions of such instruments into domestic law is far from being satisfactory. For example, Zambia has acceded to both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic and Social and Cultural Rights (ICESR). It is also a signatory to the International Covenant on the Elimination of all Forms of Discrimination Against Women and the Convention on the Rights of Children. But very little has been done to transform most of these international provisions into domestic law. The country' Bill of Rights is still encased in the first generation human rights.

The Zambian Bill of Rights has incorporated some of the provisions of the Universal Declaration of Human Rights. But as has already been shown, the provisions of the Bill of Rights are severely curtailed by octopus limitations. This means that

while the Zambian Courts will take judicial notice of such Conventions or Treaties, their domestic application is at best persuasive. It is not clear as to why Zambia has been loathe to domesticate most international human rights instruments. This could possibly be attributed to the low level of human rights activism during the period of the one-party state which spanned from 1973 to 1991. The main advantage of domesticating international human rights instrument is that the judiciary would be exposed to international human rights norms in its implementation of human rights norms.

D. Lack of Human Rights Education or Training

The Zambian Bill of Rights reflects an institutional commitment towards the country's respect for human rights. But in a nascent democracy and in a society in which radical changes are taking place rapidly, serious tensions between the State and individuals are bound to be a common occurrence. Early judges were not exposed to human rights education or training. As a result of this, most judges under the present judicial system are not as sensitive to human rights issues as they ought to be. For example, the recent decision of the High Court at Ndola declaring former President Kenneth Kaunda stateless was totally devoid of any human

rights consideration. The judgment lacked serious research for such an important case. No national or international cases were cited.[110]

It is, therefore, imperative that the judges, as arbitors of conflicts and tensions be conversant with the law and procedures of both national as well as international instruments. General principles can be established but their application and implementation through the rule of law requires an informed judiciary. To-day's judges cannot afford to simply exclaim and say that after all Zambia is not a developed country.

A Committee which was appointed in March,1993 to report on delays in the administration of justice in Zambia received evidence on the quality and competence of judges and magistrates. The Committee found as a fact that some specialisation and continued legal education for judges and magistrates can contribute to effeciency in the administration of justice.[111] This is more so now in the area of human rights since the subject has acquired global dimensions.

The University of Zambia runs a Diploma Course on Human Rights whch is open to University graduates. It is

important that judges and judicial officers at all levels be exposed to the development of a human rights culture in Zambia. This can be done through informal education in addition to University legal education.

Article 8 of the Universal Declaration of Human Rights provides for the right of an individual to effective remedies through competent national tribunals if fundamental rights and freedoms granted by a domestic constitution or national law are violated. A tribunal can only act competently if the judge or arbitrator is well versed in the law and procedure of the alleged violation.

E. States of Emergency

In terms of Article 30 of the Constitution, the President may, at any time declare that a state of emergency exists in the country. Such a declaration then allows the President to use Section 3 of Emergency Powers Act to make such regulations as appears to him:

necessary or expedient for securing the public safety, the defence of the Republic, the maintenance of public order and the suppression of mutiny, rebellion and riot and for maintaining supplies and services essential to the life of the community.

Provision of Section 3 of the Emergency Power Act are pplemented by the provisions of the Preservation of public curity Act, as read with its Regulations. Under colonial rule, ese Regulations were used to control and suppreess the tonalist movements of Africans. To-date the President still es these colonial emergency powers.

Under the state of emergency therefore, most provisions the Bill of Rights can be derogated from. Article 25 of the nstitution permits such derogations. The Constitution allows ese wide derogations which are not allowed under Article 4 the International Covenant on Civil and Political Rights CCPR) which Zambia ratified. In particular a state party is rohibited from derogating from the provisions of Article 6 ight to life); 7 (inhuman treatment) and 8 (slavery and ervitude). Under Article 5 of the African Charter on Human nd People's Rights state parties are not permitted to derogate rom the right in the treaty even under a state of

emergency.[112] But then the provisions of the Charter are themselves replete with claw-back clauses.

Given the wide derogations under the Zambian Constitution, the judiciary is looked upon as the institution most capable of redressing any violation of human rights under a state of emergency. The Courts have tried to do so with varying degrees of success. The usual procedure has been the use of **habeas corpus**. Through this procedure the detaining authority can be commanded by the Court to produce the body of the detainee before the Court and show cause why the detainee should continue to be in detention. In practice, however, most of the **habeas corpus** applications tend to be academic exercises because even after a successful application, the deteinee is invariably and promptly re-arrested on some criminal charge.

For example, immedately after his release by way of **habeas corpus**, Moyce Kaulun'gombe, security chief of former President Kenneth Kaunda, was re-arrested and charged with misprison of treason. He had previously been detained for alleged treason.[113] Similarly, in the **Rupiah Banda and 9 Others v. Attorney-General,** detainees in the famous "Zero Option" case had their detention orders

revoked while their **habeas Corpus** application was being heard by Mr. Justice James Mutale of the High Court at Lusaka. Upon their release, some of them were immediately re arrested and charged with misprison of treason or sedition.[114]

Conclusion

The judiciary has a pivotal role to play in the interpretation and implementation of human rights in the country. However, in Zambia such a role has not been easy to play especially in the face of a very powerful Executive arm of government. Most judges have not kept abreast with the developments of international human rights norms. The situation is aggravated by wide derogations in Zambia's Bill of Rights.

Chapter Four

End Notes

1 See Part III of the Contitution of Zambia.

2. As was the case during the one party era the police and other security agents routinely use excessive force when apprehending, interrogating and holding criminal suspects or illegal aliens". See Chanda, A.W, "**Human Rights in Zambia's Third Republic: An overview**", paper presented at a seminar held at the Norwegian Institute of Human Rights, Oslo, Norway, on 8th June 1995, at page 8. More recently, a Grade 12 pupil at Matero Secondary School in Lusaka died while in Police custody allegedly as a result of interrogation over a leaked physics examination paper, - **Times of Zambia**. Editorial Opinion, Tuesday November 17, 1998, p.1.

3 See **Justice Enjoined: The State of the Judiciary in Kenya,** a Report by Robert F. Kennedy Memorial Centre for Human Rights, 1992, p. 30.

4. Chanda, A.W., **"The State of Zambia's Bill of Rights vi-a-vis The International Protection of Human Rights Standards',** a paper presented at the Human Rights Commission National Vision Conference, Mulungushi Conference Centre, Lusaka, 5-8 October, 1998.

5. Article 28(1) of the Constitution.

6. Ibid, Article 28(2).

7. Subordinate Courts, popularly known as Magistrate Courts, are established under Section 3 of the Subordinate Courts Act, Cap.28, formerly Cap 45. A Subordinate Court exercises its jurisdiction only within the limits of the District for which it is constituted. All Subordinate Courts are Courts of Record. See section 11 of Cap. 28. They are classified into 1st, 2nd and 3rd classes, which classes determine the extent of the Court's jurisdiction in civil matters.'

8. Article 85 of the Industrial and Labour Relations Act No. 27 of 1993.

9. See Section 4, 8. and 9 of the Local Courts Act, Cap. 29.

10. Defence Act, Cap 106.

11. Dlamini, CRM., **Human Rights in Africa: Which Way South Africa?** Butterworths, Durban 1995. pp 115-117 on gender.

12. Section 12 of Cap. 29.

13. **Zambia Association for Research and Development(ZARD)** 'An Annotated Bibliography of Research on Zambian Women' (1985), chapter 3, p. 61 et seq.

14 **The Lands Act No. 29** of 1995, Section 29

15. Cotran, Eugene and Sherif, Adel Omar (ed) **The Role of the Judiciary in the Protection of Human Rights**, Cimel and Kluwer Law International, The Hague, The Netherlands, 1997, Chapter one.

16. Article 13 of the Constitution.

17. Article 9(1) of the ICCPR.

18. Cap.77.

19. Ibid, Section 4.

20. Cap. 108, Section 3(2).

21. Cap. 112, Section 3(2).

22. Cap. 302.

23 Ibid, Section 8.

24. Penal Code, Section 25.

25. Emergency Powers Act, Cap. 108, Section 4.

26. Criminal Procedure Code, Section 33.

27. See, for example, Statutory Instrument No. 33 of 1993 under which the Emergency Regulations were made.

28. Article 13(4).

29. **Attorney-General v. William Muzala Chipango** (1971) ZR1.

30. Ibid, p1.

31. Ibid, p8.

32. **Kawimbe v. Attorney-General**
(1974)ZR 244, p 249.

33. Ibid, p. 250. It should be noted that the judgment at p. 244 talks of 16 days a the period of detention while the award at p. 249 talks of two days as the period of confinement.

34. **Eleftheriadis v. Attorney-General** (1975) ZR 69.

35 Ibid, p.70.

36. **Seegers v. Attorney-General** (1976)ZR 117.

37 **Joyce Banda v. Attorney-General**

1978. ZR 233. The learned trial judge of the High Court had ealier held that Joyce Banda's arrest and subsquent Police detention for 9 days for an alleged criminal offence was lawful and that the detaining authorities had no onbligation to furnish her with grounds for her detention - See page 236 lines 24-30.

38. Hall, Richard., **The High Price of Principles: Kaunda and the White South,** Penguin Book. England 1969. pp. 47-48.

39 **In Re: Alice Lenshina Mulenga,** 1973. ZR 243.

40 Ndulo Muna and Turner Kaye (eds) **Civil Liberties Cases in Zambia,** The African Law Report, Oxford 1984. pp 304-324.

41 Statutory Instrument No. 32 of 1993.

42. **Rupiah Bwezani Banda and Steven Phaniso Chinombo Moyo v The Attorney-General,** 1993/HP/19 +1994/HP/279 (Unreported).

43. Statutory Instrument No. 121 as read with Gazette Notice No. 80 of 1997.

44. **Dean Namulya Mung'omba v. The Attorney General,** 1997/HP/2617 (Unreported).

45. **Constitution of the Republic of South Africa,** Section 37(3)(a).

46. **Fred M'membe and Bright Mwape v.Attorney General** 1996 /HP/1199 (Unreported).

47. Ibid, p. 19.

48. Cap.12 Section 19(e).

49. Ibid, Section 21.

50. Article 20(1) of the Constitution.

51 Ibid, Article 20 (2).

52. **The Constitution of the Republic of South Africa** 1996, Chapter 2, Section 16(1).

53. **Constitution of the Republic of Namibia,** Chapter 3, Article 21(1)(a).

54. See, for example, Sections 53 (Prohibited Publications); 57 (Printing or uttering seditious materials); 67(Publishing false news); 68 (insulting the National Anthem - which is a common feature at Hyde Park corner in London); 69(Defaming the President); 70(showing hatred to persons, race or tribe) and 71 (Defaming foreign princes). Section 16(2) of the South African Bill of Rights provides that the right to freedom of expression does not extend to propaganda for war, inciting of imminent violence or advocacy of hatred that is based on race, ethnicity, gender or religion and incitement to cause harm. The Namibian Bill of Rights contains exceptions similar to the Zambian Bill - See Article 21(2) of the Constitution of Namibia.

55 **Rex v Chona**, R + NLR (1962) 344

56. Cap.88 Section 41.

57. Cap. 88.

58 **Cobbett-Tribe v The Zambia Publishing Company** (1973)ZR 9.

59 See **Times Newspapers Zambia Ltd v Kapwepwe** (1973) ZR 292; **Attorney-General v Kapwepwe** (1974) ZR 207; **Zambia Publishing Company Ltd v. Kapwepwe** 1974, ZR 294 and **Zambia Publishing Company Ltd v. Kapwepwe** (1978), ZR 15.

60 **Michael Chilufya Sata v Post Newpapers Zambia and Printpak Zambia** , 1992/HP/1395 and 1804 and 1993/HP/821 (Unreported), p.20. It should be noted that although Printpak Zambia Limited (2nd Defendant) was cited, it was a Government controlled company but it was also the publishing company for the 1st Defendant at the material time.

61 Ibid, page 25, lines 19-24.

62 Ibid, p 47.

63 Cap. 87, Sections 67, 69 and 71.

64 Article 28(2)(a) of the Constitution

65 **Fred M'membe, Bright Mwape, Masautso Phiri and Goliath Mungonge, v. The People,** Supreme Court Appeal Nos. 87 and 107 of 1995 (unreported).

66. **The Post,** 26th January, 1996, p.3

67. Ibid, the then Vice-President Brigadier-General Godfrey Miyanda was reported to have said so in Parliament, p. 3.

68 Cap.87, section 53.

69. Cap. 111 section 4(3).

70. 1996/HP/38 (Unreported).

71 For a detailed discussion of this case, see Dr. Alfred Chanda's article entitled 'The State Security Act v Open Society; Does a Democracy need Secrets?'. **Zambia Law Journal** Vol.29 199 p. 33 et seq.

72 Article 21(2) of the Constitution.

73 William Banda, an alleged Malawian was declared a prohibited immigrant in Zambia after trial and unsuccessful appeal to the Supreme Court; Judgement number 16 of 1994 (unreported). The late John Chinula was deported to Malawi without trial in the same year.

74 Article 21(2) of the Constitution.

75 **Feliya Kachasu v. The Attorney-General** (1967) ZR 145.

76. **Harry Mwaanga Nkumbula v. The Attorney-General** (1972) ZR 204.

77 Cap. 41.

78 Supra, note 76 p.204.

79 Ibid, p 205.

80 Ibid, p. 214.

81 Gupta, Chandra P., supra, **Zambia Law Journal** Vol. 5, 1973, p. 147 et seq.

82 **William Banda v. The Attorney-General** (1992/HP/1005) (Unreported).

83 Cap 113, section 5(4).

84 Ibid, section 5(1).

85 **Alfred Mthakati Zulu v The Attorney-General,** Supreme Court Judgment No 5 of 1994 (unreported).

86 **Arthur Lubinda Wina + Six Others v.Attorney-General,** 1990/HP/1511 (unreported).

87 (1995) HPR/11.

88 **Christine Mulundika and 7 others v. The People** Supreme Court Judgment No.25 of 1995 delivered on 10 January 1996 (unreported), at p.J6.

89 Ibid, at p. J18.

90 Immigration Act. 1954 (Federal Act No.3).

91 Ibid, Section 13(1)(e).

92 Ibid, Section 5(1)(a).

93. Immigration (Amendment)Act 1964.

94. **Attorney-General v. Thirton (1967) ZR10.**

95 Article 22(3)(6) of the Constitution.

96 **Paton v. Attorney-General** (1968) ZR 185

97 **Andreas Sachariah Shipanga v. The Attorney-General** (1976)ZR224

98 **William Banda v Chief Immigration Officer and the Attorney-General** 1991/HJ/12 unreported, Per Mr. Justice Tamala Kakusa at the High Court in Chipata at p. 125, paragraph 2. See also Supreme Court Judgment No. 16 of 1994 (unreported)

99 The recent Supreme Court Judgment on President Chiluba being declared a Zambian regardless of the origin of his parents presents a possible jump-seat for William Banda to return to Zambia in the same way that Paton did after the Thixton case.

100 For some interesting cases on the restriction of the freedom of movement of movement see, inter alia, the following cases:-

In Re:**Kapwepwe and Kaenga** (1972) ZR 248

In Re: Thomas Cain (1974 ZR 71;

Munalula & Others v. Attorney-General (1979) ZR 154; and **Attorney-General v Valentine Musakanya (1981) ZR1.**

101 **Fred Mmembe and Bright Mwape v. Attorney-General,** supra note 46.

102 The period between 1964 and 1973 is known as the First Republic, 1973 to 1991, the Second Republic; and from 1991 the period is known as the Third Republic.

103 Mwanakatwe, John M., **End of Kaunda Era,** Multimedia Publications, Lusaka, Zambia (1994), p. 246.

104 Penal Code, supra note 63.

105 **Dean Mun'gomba's** Case, supra note 44.

106 **Christine Mulundika's** Case, supra note 88.

107 **The Post,** Thursday, 28 January, 1999 at pp 1 and 4. A few days later the Minister of Legal Affairs and the Law Association of Zambia defended the judges.

108 Easterners -Chief Justice Ngulube, Judges Ernest Sakala, Dennis Chirwa and Florence Mumba. Northerners are Deputy Chief Justice Bweupe, Judges Mathew Chaila and Lombe Chibesakunda. Judges Muzyamba and Lewanika are from South and Central respectively. Currently, there are no Supreme Court judges from Western and Northwestern Provinces.

109 **Remmy Mushota, Patrick Katyoka v. Kenneth Kaunda** 1997/HN357(unreported).

110. Ibid.

111 **Report of the Special Committee on Delays in the Administration of Justice and Delivery of Judgment,** Supreme Court, Lusaka, March, 1993 especially Chapter IV, pp22-30

112 See **Commission Nationale des Juristes de Droit de l'homme et de libertes v. Chad** 4/92 **in the 9th Annual Activity Report of the African Commission on Human and People's Rights Annex VIII.** See also **Peter Chiko Bwalya v. Zambia, Views of the UN Human Rights Committee,** Human Rights Law Journal, **Vol. 16 No. 10-12 (1995 at pp 389-390.**

113 **The Post,** No. 913, Friday, February 13, 1998, p 1.

114 Chanda, A.W., 'Human Rights in Zambia's Third Republic: An Overview', **Legality Journal,** University of Zambia Law Association (1998), p. 65. See also High Court cause No. 1993/HP/658.

CHAPTER FIVE

THE INDEPENDENCE OF THE JUDICIARY

Introduction

Fundamental rights and freedoms of the individual are better protected and enforced in a society where the judiciary is free from any form of interference or pressure and where the Courts themselves are independent, impartial and competent.

The principles embodying the concept of the independence of the judiciary are mainly two-fold. Firstly, that judges should be free to decide on matters before them impartially and in accordance with their understanding of the facts and the law at issue. Secondly, that the judiciary should be independent of the Executive and the Legislature. This second principle which incorporates the concept of separation of powers in a state, is sometimes known as the **trias politika** [1]. However, judicial independence and impartiality in themselves are inadequate to constitute guarantees for the

protection and promotion of human rights. There are other factors which influence the independence of the judiciary. These will be discussed later.

This Chapter seeks to examine the extent to which the judiciary in Zambia could be described as independent. It will also discuss the various elements or factors comprised in the concept of judicial independence against the backdrop of international principles and standards.

Section 1 Freedom to decide cases impartially

Freedom to decide cases impartially and in accordance with the rule of law requires men and women of personal integrity and versed in the law. It also requires conditions of service that would shield judges from the temptation of corruption and partiality or bias. These two factors invite an examination of the mode of recruitment of judges in Zambia and their conditions of service.

A. Appointment of Judges

The Constitution of Zambia empowers the President to appoint the Chief Justice and the Deputy Chief Justice subject to ratification by the National Assembly. It also empowers the President to appoint Judges of the Supreme Court subject to ratification by the National Assembly [2].

High Court Judges, also known a Puisne Judges, the Chairman and Deputy Chairman of the Industrial Relations Court are appointed by the President after consulting the Judicial Service Commission [3]. The Chief Administrator of the Judicature is appointed by the President on the recommendation of the Judicial Service Commission [4]. The remaining Judicial officers such as the Master, Deputy Master, Assistant Master of the Supreme Court; High Court Registrars, Deputy Registrars; Assistant Registrars; District Registrars; Director and Deputy Directors of Local Courts; Senior Presiding Justices and Presiding Justices of Local Courts, the Sheriff of Zambia the Deputy Sheriff, Assistant Sheriff and "such other officers of any Court" as may be required, are appointed by the Judicial Service Commission [5].

The idea of Presidential appointments being ratified by the National Assembly, which means confirmation or acceptance of such appointments, is to insulate these senior Judicial appointments from nepotism and political manipulation. Under the One-party state, the Constitution empowered the President to appoint the Chief Justice and " other Judges of the Supreme Court" without seeking the ratification of Parliament. [6] Judges of the High Court or Puisne Judges were appointed by the President on the advice of the Judicial Service Commission [7].

There is no doubt that senior Judicial appointments in the One-Party state were the prerogative of the President. But in the Third Republic, with a return to Multi-Party politics it was appreciated that although the appointment of Judges was primarily an executive function, nevertheless such a function should be subjected to a process of checks and balances through ratification by the National Assembly. In practice however, the suspected mischief does not appear to have been cured for the simple reason that the so-called Multi-Party Parliament of the Third Republic is a **de facto** one-party National Assembly. The ruling MMD Government has such an overwhelming majority in Parliament that it can virtually legislate as it wishes.

Theoretically, Judicial appointments by the Judicial Service Commission appear to be much more insulated against political manipulation than Presidential appointments. In practice, much depends on the composition of the Commission itself and how it carries out its functions. Currently, the Judicial Service Commission is Chaired by the Chief Justice. Members are the Attorney-General, the Solicitor-General, the Secretary to the Cabinet, the Chairman of the Public Service Commission, a Judge nominated by the Chief Justice, a person appointed by the President, a Member of Parliament appointed by the Speaker of Parliament, the Dean of the School of Law of the University of Zambia and a member **nominated** by the Law Association of Zambia but **appointed** by the President.[8]

It can be seen from the Commission's composition that virtually every member is appointed directly or indirectly by the President. This does not mean that every member's integrity or independence of judgement can be impeached upon this factor alone, but it goes a long way towards identifying the possible mischief, namely, the over-bearing hand of the Executive. The checks and balances are likely to be compromised.

B. Qualifications:

It is provided that a person shall not be qualified to be appointed as a Judge of the Supreme Court High Court, Chairman or Deputy Chairman of the Industrial Relations Court unless that person holds or has held high judicial office or is holder of specified qualifications as contained in the Legal Practitioners Act.[9] The qualifying period for a Supreme Court Judge is not less than fifteen years of experience on the bench or at the Bar. In the Case of High Court Judges, Chairman or Deputy Chairmen of the Industrial Relations Court, the qualifying period is not less than ten years.

The President or the Judicial Service Commission as the case may be is empowered under the Constitution to appoint any person believed to be "capable and suitable" as a Judge of the Supreme Court, High Court, Chairman or Deputy Chairman of the Industrial Relations Court not withstanding that the person so appointed has not held the foregoing prescribed qualifications[10]. Here lies a great temptation for executive patronage or nepotism. Qualifications for lower Judicial offices are as prescribed by the Judicial Service Commission.[11]

The appointment of Judges in most jurisdictions especially in the so-called third world always shows signs of political, tribal or ethnic equations. In the one-party state of Zambia it was called tribal balancing. In the Third Republic it seems that the tribal equation came into play in filling the the position of Chief Justice upon the resignation of the incumbent Chief Justice Annel Silungwe.

While Deputy Chief Justice Matthew Ngulube an Easterner was elevated to the rank of Chief Justice, his place was filled by a Northerner, Justice Bweupe who was elevated straight from the High Court, thus rising above all Supreme Court judges. The next senior judge in the Supreme Court after Ngulube was Ernest Sakala, another Easterner. Presumably, had the ethnic equation not been put into play, Justice Ernest Sakala would have become the Deputy Chief Justice.

Perhaps in all fairness to Mr. Justice Bweupe, it should be pointed out that although he remained somewhat static on the High Court Bench, he was one of the first few Zambians to be appointed to the Bench soon after independence.[12]

The ethnic equation was used in both the First and the Second Republics to promote the concept of 'one Zambia one nation', especially in the formative years after the attainment of independence. However, after more than thirty years of independence, such ethnic equations should be discouraged in order to make judicial appointments based on merit. Appointments based on merit are bound to promote the independence and impartiality of judges since they could not be looking for patronage to rise in the judicial hierarchy.

C. Conditions of Service.

Judges occupy senior ranks in the judicial hierarchy. and as such they are entitled to a status comparable to that enjoyed by other senior members of other organs of the state. Their conditions of service must be commensurate with their status in society.

Conditions of service for Judges are regulated by an Act of Parliament [13]. The Act empowers the President to make regulations in respect of Judges salaries and general conditions of service. Good conditions of service contribute to the enhancement of the image and status of judges. Such

conditions include, salaries, housing, office accommodation, transport, security of tenure and other fringe benefit such as domestic workers, drivers and security guards.

The empowerment of the President by an Act of Parliament to make regulations governing the conditions of service of judges raises concerns regarding the independence and impartiality of the judiciary. When this is added to the fact that the President is also empowered to appoint the Chief Justice, Deputy Chief Justice, Judges of both the Supreme Court and the High Court, the perceived concerns over the President's powers to make regulations governing the judges' conditions of service become real.

D. Salaries and Perks

The Chief Justice now receives an annual salary of K20,000,004 which is currently approximately 8,300 United State dollars per annum or about 700 dollars per month. In 1996 he was in receipt of K10,449.312 per annum which was equivalent to 8,200 United States dollars per annum or 690 dollars per month. The Deputy Chief Justice receives K18,000,000 per annum from K9,404.364 in 1996. Supreme

Court Judges receive K16,000,000 per annum or approximately 6,600 U dollars per annum. The Chairperson of the Industrial Relations Court receives K15,000,000 per annum or approximately 6,200 US dollars per annum. [14]

In addition to their salaries Judges are paid tax free allowances. These are a non-practising allowance of twenty per centum of the basic salary. When travelling locally or abroad such allowances as may be determined by Government together with fuel allowance as may again be determined by the Government.

In 1997 salary increments were more than doubled in less than one year and they were made in midstream of the Presidential and Parliamentary Petition then before the Supreme Court. This raised suspicions that the increments were meant to influence the Supreme Court judges who were adjudicating over the Presidential Petition challenging the President's nationality.

Judges are also entitled to fringe benefits such as a cook, a house-servant and a gardener. In addition, the Chief Justice is entitled to a laundry man. Judges are entitled to a rent free fully furnished house and if a Judge lives in his or her own

house the Government pays Municipal rates for the house.[15] They are entitled to an armed security guard for twenty four hours. They are also entitled to a personal-to-holder vehicle and a driver. The vehicle is maintained and is replaced every five years if funds are available. When travelling by air the Chief Justice travels first class. Other Judges travel by business class. Judges are entitled to diplomatic passports. They enjoy judicial immunity for any act done in the execution of their functions. The professional immunity of judges is discussed in detail in the next Section.

The Government pays for all local telephone bills and for official international calls. A Judge, spouse and children are entitled to medical treatment at Government expense. The Government insures Judges against personal injury up to a total of five times the basic salary. Car loans equivalent to five times a Judge's salary or the actual cost of a car whichever is the lower, are available to Judges. House loans, equivalent to ten times the judges basic salary or actual cost of the house whichever is lower are also available. Judges are entitled to leave at the rate of three and half working days per calender month subject to the exigencies of the office.[16]

For funeral expenses the Government pays such expenses for a judge, the spouse and the children of the judge by way of coffin, transport to assist in the organisation of the funeral within the locality where the funeral is taking place. These conditions apply to a judge whether or not the judge dies in office.[17] Upon retirement or death of a judge the Government is responsible for the transportation to any place in Zambia of the judge's effect.[18] Currently there are no expatriate judges in Zambia.

Ordinarily, judges retire upon attaining the age of sixty-five years, but the President can allow a judge to continue in office even after attaining that age for a further period, not exceeding seven years [19]. The current Deputy Chief Justice B.K Bweupe is on a seven-year contract under this constitutional provision.

Generally, the fringe benefits for judges appear comparatively attractive but the salaries are far from being so. The devaluation of the kwacha has meant that the salary increment of 1997 made no difference to the 1996 salaries for judges, even though the 1996 salaries were doubled in 1997.

E. Privileges and Social Status

In Zambia's traditional social set-up, Judges or **indunas** have always been held in high regard as they are classified among the wise men and women in society. Even in modern Zambia Judges are among the classes of people generally held in high esteem. However, for Judges to continue to enjoy this respect, they must be seen to be men and women of high integrity and ability in the performance of their duties.

Zambian judges like their counterparts under common law jurisdictions enjoy professional immunity. No action can be maintained against a Judge for anything said or done in the course of his or her duties. Whatever a judge says in the exercise of his or her duties is absolutely privileged. The orders or sentence he or she may impose, no matter how iniquitous they may be, cannot be the subject of civil or criminal litigation against the judge. [20]

In **Godfrey Miyanda's** case, the applicant to the Supreme Court averred that his civil case was pending for **judgment** for more than eight months. He was grossly dissatisfied with the inordinate delay. He appealed to the Supreme Court for leave to apply for an order of

mandamus to compel the judge seized with the case to deliver judgment. Deputy Chief Justice Matthew Ngulube, as he then was, found against the applicant holding that the Supreme Court had no jurisdiction to entertain an application for **mandamus** at first instance. More importantly, however, the learned Deputy Chief Justice held that the remedy of mandamus was not available against judges of superior courts of Zambia "in the event of an alleged failure to perform their judicial functions"[21]. This is amazing because it means that an application for **mandamus** against judges of the superior courts in Zambia has no remedy even before the highest Court of the country. Surely the Supreme Court should have orginal jurisdiction to control the Supreme Court and High Court in the event of allegations against a judge of failure to perform his function. This is certainly a legal lacuna which requires immediate rectification.

F. Security of Tenure

Security of tenure of office is cardinal to the independence of judges and the judiciary in general. The Constitution has stipulated procedures for the discipline and removal of judges from office.

A Judge of the Supreme Court, High Court, Chairperson or Deputy Chairperson of the Industrial Relations Court can only be removed from office for inability to perform the functions of office arising from infirmity of body or mind, incompetence or misbehaviour[22]. However, if the President considers that the removal of a judge under these provisions ought to be investigated, then he must appoint a tribunal to inquire into the matter.[23] This study has not come across any judge who has been removed from office as a result of infirmity of body or mind. There have, however been a few cases of misbehaviour.

In March 1996, the Government had made a proposal to amend the Constitution so as to give the President the power to dismiss judges for "gross misconduct" Gross misconduct was defined as taking into account by a judge in passing judgment of extraneous considerations whether political, personal or otherwise. That proposal if passed by Parliament would have severely eroded the independence of the judiciary in that the President would have been given power to dismiss a judge subject only to ratification by Parliament without involving an independent tribunal as currently provided for when a judge is to be removed for inability, misbehaviour or incompetence. Luckily, there was strong opinion against the

proposal spearheaded by the Law Association of Zambia(LAZ), the Magistrates and Judges Association and some prominent academicians. The Government withdrew the proposed amendment [24].

The current practice for the removal of a judge is by a judicial inquiry through a tribunal. If the President is of the view that the conduct of a judge ought to be investigated resulting in a possible dismissal of such a judge, the President must appoint a tribunal. The tribunal must consist of a Chairperson and not less than two other members who hold or have held high judicial office. The tribunal then inquires into the matter, makes its report and advises the President whether or not the judge ought to be removed from office[25].

These provisions must be set against the background of the independence and autonomy of judges enshrined in Article 91(2) of the Constitution. By an Act of Parliament the Judicature has been established as an autonomous organ of the State.[26]. The impact of the Judicature Administration Act on this concept of independence of the judiciary has yet to be seen.

On paper, there exists an impressive record of provisions guaranteeing the independence of judges and the judiciary. Despite these guarantees, however, the security of tenure of Judges in Zambia is still questionable. A few cases or incidents will be discussed to illustrate this perception.

G Discipline and Removal of Judges

There are two interesting cases in this area. One happened in the Second Republic. It involved Mr. Justice Batholomew Sampa Mumba, in 1984, then of the High Court at Kitwe. He was accused of gross insubordination after some acrimonious correspondence between him and Chief Justice Silungwe arising out of a proposed transfer of Judge Mumba to Ndola. The Chief Justice complained and the President appointed a tribunal under the Chairmanship of the then Minister of Legal Affairs and Attorney-General, Fredrick Chomba in terms of Article 113(3) of the Constitution. Other members of the tribunal were Mr. Justice R.M. Kapembwa, then Investigator-General and Mr. John Jearey a prominent Lusaka private legal practitioner. After a lengthy hearing, the tribunal found against Mr Justice Mumba and recommended to

the President that he be removed from office and he was removed accordingly[27].

More recently, Mr. Justice Kabazo Chanda of the High Court at Lusaka was suspended by the President pending investigations into his conduct. The President appointed a tribunal comprising Mr. Justice R.M. Kapembwa who served on the Mumba Inquiry in 1984, Mr. Justice Brian Gardner, a retired Supreme Court Judge and Mr. Justice Leonard Unyolo, a Supreme Court Judge from Malawi.

It was not immediately clear what prompted the judge's suspension but it was expected that once the tribunal started sitting the charges would be made public. Unfortunately, before the tribunal could sit, Judge Kabazo Chanda resigned. Speculations remained that he could have been a victim of executive displeasure especially for the manner in which he handled the release of some 53 prisoners who had not been brought to Court expeditiously by the state Prosecutors.[28]

The Constitutional provisions regarding the suspension or removal of a judge from office are somewhat vague as to who makes the complaint for the President to "consider" the

possibility of instituting an investigation against the accused judge. In the case of Mr. Justice Mumba it was the Chief Justice who laid a complaint against him for gross insubordination. The tribunal upheld the complaint but in the case of Mr. Justice Kabazo Chanda it was not clear who the complainant was. It is also not clear why even after his resignation, Judge Kabazo Chanda's inquiry should not have proceeded.

H. Autonomy, Funds and Physical Environment

The Constitution provides for the establishment of an autonomous Judicature for administration of Courts in Zambia. Consequent upon this provision, Parliament enacted the Judicature Act. Under the Act the President is empowered to appoint a Chief Administrator of the Judicature. The Chief Administrator is responsible for the day to day administration of the Judicature and is the controlling officer in respect of the expenditure of the Judicature [29].

It is an open secret that despite determined efforts by the State to improve the salaries and conditions of service in the Judiciary, general working conditions are still far from

being satisfactory, especially in the lower ranks of the Judiciary. Lack of Court rooms is still a problem especially in subordinate courts. Most courts are poorly ventilated and poorly lit. The accoustics and ventilation are generally poor. The furniture in most Court rooms is deplorable and irrepairable. These condition have a debilitating effect on judges, magistrates and even on the lawyers and litigants.[30] Transport problems are still rampant especially for magistrates and the lower ranks. Currently, the Law Association of Zambia is on a fundraising campaign among lawyers on the Copperbelt in order to raise funds to rehabilitate Ndola and Kitwe High Courts. It would appear that the paucity of funds has continued to haunt the so-called autonomous Judicature.

The Judicature is, however, autonomous and empowered to make appointments of certain categories of members of staff through the Judicial Service Commission.[31] The Commision also exercises powers of dismissal, disciplining or termination of appointment of any member of staff holding office under the Commission.[32] The funds for the Judicature are appropriated by Parliament but these are supplemented by income from court fees and grants.[33] Nevertheless, the Judicature is still severely under-staffed and under-funded.

Section 2 : Freedom from Interference by the Executive and the Legislature.

A common feature of most written Constitutions in Common Law Africa is that they contain separate sections or Chapters dealing with the Legislature, the Executive and the Judiciary. It is provided under Zambian law that the Constitution is the supreme law of the land and that it "shall bind all persons in the Republic and all Legislative, Executive and Judicial organs of the State".[34] The Constitution also contains separate Chapters or Parts dealing specifically with these three Organs of the State. Part IV deals with the Executive, Part V deals with the Legislature while Part VI deals with the Judicature. By this arrangement it is clear that the Constitution envisages some form of separation of powers [35].

A. Separation of Powers : (Trias Politika).

The basis of the doctrine of separation of powers also known as the 'trias politika' is simply that people in whom power is vested to legislate, to govern or to adjudicate are prone to abuse such powers unless they are separated from one another and do not interfere with each other's functions.

That Liberty and freedom would be safeguarded or protected only if these three arms of the State namely, the Executive, the Legislature and the Judiciary are independent of each other. Only then can the necessary checks and balances be provided in a democratic state.[36]

The doctrine of separation of powers is popularly attributed to the French philosopher, Baron de Montesquieu who published his famous book **L'esprit de Lois** (Spirit of the Laws) in 1748. He propounded the theory that if the powers of the three important organs of the state were not separated, the result would be the passing of oppressive laws, arbitrary rule and tyranny. The doctrine was primarily aimed at limiting the institutionalised power of the State within legal limits.

Although the doctrine is generally attributed to Montesquieu, in fact it probably goes as far back as the days of the Roman Empire and the days of Aristotle.[37] It was further developed by the English philosopher, John Locke towards the end of the 17th Century when he published the **Second Treatise of Civil Government** in 1690. Montesqueiu based his analysis of the doctrine on an ideal English Constitutional system and not on a real situation.[38]

The doctrine of separation of powers does not, in reality, mean that there should be rigid compartments between the Legislature, the Executive and the Judiciary. Modern society is too complex to allow that. Some form of interrelationship between the three organs is necessary and, indeed, such overlapping might insure against arbitrariness on the part of one or more of the three Organs. However, each organ must be given sufficient latitude to go about its work without constantly looking over its shoulder.

The judiciary must be treated as a separate but equal organ of the state. Equal and complementary to the Executive and Legislature. Judges must be accorded status equal to the most senior members of the state machinery[39]. Generally, the status of judges in each country will be reflected in their general conditions of service such as salaries, accommodation, transport, , fringe benefits and security of tenure. But security of tenure is crucial to the independence of judges and the judiciary in general.

In return for their high status, judges must be people of unimpeachable integrity and high moral conduct. They must be above reproach and must adhere strictly to their code of professional ethics. Their judicial duties must come before

their personal or private interests. Their impartiality, sense of justice and fairness must never be doubted. Mr Justice B.J Odeki, then a Judge of the Court of Appeal of Uganda, said that Judges in that country were accorded a status equal to that of Cabinet Ministers [40]. In Zambia, judges enjoy similar status in terms of general conditions of service but their functions are sometimes subject to unjustified criticism or even manipulation, usually for political exigencies. For example, the use of judges for jobs other than those concerned with adjudicating in the traditional sense, such as appointment to the Commission for Investigations, the Anti-Corruption Commission, Human Rights Commission or the Electoral Commission. While it is appreciated that such judges take with them to these bodies, their experience and training, the danger of judges being embroiled in political controversies is more prevalent under such appointments than under the Judicature. The level of accountability to the Executive is much higher under such 'outside' job than in the judiciary.[41]

B. Executive / Legislative Revision of Court decisions

The concept of separation of powers, as has already been discussed, implies that there be an autonomous Judicature complemented by an independent Judiciary. The concept of the Judicature focuses attention on the structure, functions and general administration of courts while the concept of the Judiciary places emphasis on the role of Judges.

The Zambian Parliament has enacted various laws to either protect itself or the Executive against any perceived encroachment by the Courts over the powers of the other two arms of the State. For example, Section 34 of the National Assembly (Powers and Privileges) Act, provides that neither the Assembly, the Speaker nor any officer shall be subject to the jurisdiction of any Court in respect of the exercise of any power conferred on or vested in the Assembly, in the Speaker or in such officer.

However, in interpreting these provisions, the Courts have relied on the distinction between the rights of the National Assembly to manage its own internal proceedings and the discharge of obligations imposed by the Constitution. The authority of the Assembly is exclusive on the former while

the Court will intervene to compel compliance with Constitutional provisions.[42] Recently, in the case of **Fred M'membe and Bright Mwape** the Court held that the purported ouster contained in Section 34 refers only to certain minor Parliament actions.[43] And more recently, Justice Peter Chitengi of the High Court at Lusaka said that Parliament did not have unlimited powers. He held that the suspensions of MPs Tetamashimba, Muasa and Kongwa by Parliament were unconstitutional apparently, because Parliament had no such power.[44]

Similarly, under section 16 (1) of the State Proceedings Act, Courts are precluded from granting orders of injunctions or specific performance against the State. The Supreme Court, while acknowledging that "there is a growing school of thought against the continued existence of state immunity against injunctive relief and other coecive orders", nevertheless felt unable to strike down this provision as unconstitutional even in the teeth of the provisions of Article 28(1) of the Constitution.[45]

This Article provides that if any person alleged that any of the provisions under the Bill of Rights **has been** or is **likely to be** contravened in respect of that person, then that

person may apply to the High Court for redress. The Court is empowered "to make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement" of any of the provision under the Bill of Rights. This provision, it is submitted, is superior to the provisions of the State Proceedings Act. Surprisingly, the Supreme Court ruled otherwise [46].

(i). Improper use of Legal powers

There have been times in the legal history of the country when either the Executive or the Legislature has resorted to improper use of legal powers to thwart the effects of court decisions. A few examples will suffice.

In the Carlo Ottino Case in1967 Mr Ottino was a butcher in Lusaka, of Italian origin. He gave a Christmas gift of a frozen turkey to the second lady of the new Republic of Zambia, Mrs Edinah Kamanga. Mr. Reuben Kamanga was then Vice-President. The gift was given through Mrs Kamanga's house servant. The next day Mrs Kamanga discovered that the

gift which she thought was a chicken was in fact rotten. She went to Ottino's butchery and had an altercation with him.. She left the butchery and promised to teach him a lesson.

A few days later. Lusaka City Council licensing Authorities ordered the closure of the butchery whereupon Ottino went to Court and obtained an injunction to restrain the licensing authorities from interfering with his business. The then Mayor of Lusaka Mr. Witson Banda and a Mr Eustace Mumba of the United National Independence Party (UNIP) organised a demonstration against Ottino's butchery. Mumba was committed to six months imprisonment for contempt of Court. [47]

The Mayor was also commited for contempt of Court but was later released. A week after Mumba's imprisonment the President of the Republic released him under the prerogative of mercy. The judiciary viewed that action with great concern but the judges were powerless. The Executive had flexed its muscles. Admittedly, the President had exercised his constitutional powers under the prerogative of mercy in accordance with the provisions of the Constitution but the timing caused grave concern in the ranks of the judiciary.[48]

More recently, the Supreme Court's efforts to promote human rights in the country were thwarted by Parliament after the Court's landmark judgment in **Christine Mulundika and 7 others.** This case goes to show once more that the Legislature, like the Executive, is not prepared to accept Court decisions which are perceived to be against either or both of these two organs of the State.[49]

The Court considered the constitutionality of certain Sections of the Public Order Act and in particular, Section 5(4) of the Act which required a prior police permit to conduct an assembly or a procession. The Supreme Court struck down the Section a being unconstitutional much to the annoyance of Parliament.[50]

With lighting speed the Legislature amended the Public Order Act. An examination of the amendment reveals that they are more undemocratic than the regulations which were challenged as being unconstitutional.[51]

(ii). Direct Criticism of Court decisions

Another feature of grave concern in the relationship between the Judiciary on one hand and the Executive and the Legislature on the other, has been in the area of direct criticism of Court decisions and mob incitement against Judges who delivered such Judgments.

Two years after the Ottino case came the Silva and Freitas case in (1969). It involved two Portuguese soldiers who were charged with entering Zambia illegally from Angola. The Magistrate's court passed sentences of two years imprisonment and K200 fine each which were viewed by the High Court as being extremely excessive in view of what the Judge described as the trivial nature of the case. On review, Mr. Justice Evans discharged the prisoners under the then Section 418 of the Penal Code. The Judge was accused of making a political decision and disregarding the security of the Nation. Chief Justice James Skinner defended the Judge.

In a letter to the President dated 15th July 1969, the Chief Justice refuted the accusations levelled against Mr. Justice Evans. In paragraph 2 of the letter the Chief Justice stated as follows:-

> I do not accept the judgement of Mr. Justice Evans was in any way or sense a political one, or motivated in any way by political considerations, and it is wrong to describe it in such terms. I have consulted other judges we are unanimously of the opinion that Mr. Justice Evans acted properly and his decision did justice.

The learned Chief Justice made the letter public because, as he argued, the President had condemned the Judiciary publicly. The following day UNIP conducted a demonstration against the Chief Justice led by Eustace Mumba of the **Carlo Ottino** fame. The Chief Justice was forced to flee from Zambia and never returned. However, none of the judges the learned Chief Justice consulted including the accused Judge Evans resigned in protest.

One informed writer has suggested that indifference by Judge Evans to the socio-political realities of the society in which the Judiciary was operating may affect its credibility [52]. It is, however submitted that an overzealous response by Judges to the so-called socio-political realities of the society in which the Judiciary is operating might also affect it credibility. Perhaps the Judge should not have discharged the prisoners

absolutely at the time when Zambia was virtually in a state of war with its neighbouring colonialists

In the early days of the Third Republic the Judiciary was seized with another confrontation with the Executive arm of the State. It was in the **Kambarage Kaunda** case in 1992.

Kambarage Kaunda, one of the sons of the former President Kenneth Kaunda was accused of murdering a woman, Tabeth Mwanza, by using a fire-arm. On perusing the docket the Director of Public Prosecutions(DPP) decided to charge Kambarage with manslaughter instead of murder.[53]

When Kambarage first appeared before Mr. Justice Cleaver Musumali in the High Court, the learned trial judge ruled that the proper charge, in his view was murder. The learned trial judge then proceeded to full trial and found Kambarage guilty of murder and sentenced him to death by hanging. It is important to note that Mr. Justice Musumali's judgement was delivered on 14th October 1991, two weeks before the Movement for Muti-party Democracy (MMD) came to power. At that time public feelings, were generally, rising against Kaunda's government.

The prisoner appealed to the Supreme Court which acquitted him on 19th March 1992 citing several defects in the trial judge's judgment. The coram was Chief Justice Annel Silungwe, Acting Deputy Chief Justice Brian Gardner and Supreme Court Judge, Mr. Justice Ernest Sakala[54].

The Supreme Court's judgment was swiftly condemned by the then Minister of Legal Affairs, Rodger Chongwe. He was reported as telling the MMD activists in his Mandevu Constituency in Lusaka that they were free to protest against the judgment. Chief Justice Annel Silungwe was accused of being a close friend of the former President[55]. Judge Kabazo Chanda who has now resigned while under Presidential suspension and the trial Judge Musumali himself joined the chorus of condemnation. Musumali was later elevated to the Supreme Court surpassing some senior High Court Judges. The MMD made it virtually impossible for Chief Justice Silungwe to stay in office. He resigned and is now at the High Court in Namibia.[56]

CONCLUSION

It is now widely accepted that the independence of the judiciary and the legal profession is a necessary pre-requisite to the proper administration of justice, and for the protection and promotion of human rights in any democratic state. A well equipped and qualified judiciary which is free from intimidation or undue political pressure coupled with an independent and active legal profession can advance and preserve human rights for all in society.

On paper, Zambia has put in place the minimum international norms for the independence and autonomy of judges and the judiciary. The Constitution of Zambia also recognises the principle of the separation of powers but in practice this separation is mythical. No one, of course, expects a complete separation of the judiciary from the other two arms of the State but states which respect the independence of the judiciary enjoy stable democracy and promote justice for all.

However, in Zambia as in most Commonwealth States the President appoints all Ministers and their Deputies. He also appoints the Chief Justice, the Deputy Chief Justice, Judges

of the Supreme Court and High Court. True, the appointments are subject to ratification by the Natonal Assembly but the Legislature in the Third Republic is a **de facto** one-party Chamber.

Conditions of service for judges of the Supreme Court and High Court have recently been improved but those for lower judges are still very poor when compared with the private sector at the same level. They have no personal-to-holder cars, no security guards and most court rooms are in dire need of rehabilitation. A 1993 judicial report states that the investigating committee was shocked to hear that some Magistrates have their residential accommodation in shanty compounds.[57] To-date the situation has not improved much.

There are, however, some promising signs in the exercise of their independence by some judges. In the few cases that have been discussed in this Chapter, it is clear that some judges are now beginning to show their assertivenes in their rulings even over politically sensitive issues.[58]

CHAPTER FIVE

End Notes

1. Basson, Dion and Viljoen, Henning; **South African Contitutional Law**, Juta & Co Ltd; Cape Town, 1988 p. 264.

2. **The Constitution of Zambia,** Article 93(1)(2).

3. Ibid, Article 95(1)(2).

4. **Judicature Administration Act No. 42 of 1994,** Section 3(1).

5. Ibid, Section 4(1).

6. **The 1973 Constitution of Zambia,** Article 108(1).

7 Ibid - Article 110(1).

8. See **The Judicial Service Commission Act No. 24 of 1991,** Section 3(1).

9. Cap. 30 (formerly Cap. 48) as read with Article 97(1)(a) (b) of the Constitution.

10. Article 97(2) of the Constitution.

11. Judicial Service Commission Act, supra note 8.

12. **The Judicature Administration Act No. 42 of 1994** provides that Judges of the Supreme Court, other than the Chief Justice and Deputy Chief Justice, shall rank according to the date on which they were appointed to the Supreme Court while Judges of other Courts who hold equal office shall rank according to the date when they were enrolled as practitioners under the Legal Practitioners Act.

13 **The Judges (Conditions of Service) Act,** Chapter 27 of the Law of Zambia. See also Act No. 14 of 1996 as read with Statutory Instrument No. 140 of 1996 which in PartII sets out a comprehensive list of Judges Conditions of Service.

14. See Statutory Instrument Number 67 of 1997.

15. Statutory Instrument No. 140 of 1996 ,Regulation 5(2).

16. Ibid, PartII.

17. Ibid, Regulation 16(2).

18. Ibid, Regulation 17.

19. Article 98(1) of the Constitution.

20. See **Sirros v. Moore** (1974) 3 WLR 459.

21 **Godfrey Miyanda v. The High Court** (1984)ZR 62.

22 Article 89(2) of the Constitution.

23. Ibid, Article 98(3).

24. See the Report on Zambia in **'Attacks on Justice: The Harrassment and Persecution of Judges and Lawyers'**. Published by the Centre for the Independence of Judges and Lawyers for the period January 1996 to February 1997, Geneva, Switzerland.

25 Article 98(3)(b) of the Constitution.

26 The Judicature Administration Act No. 42 of 1994.

27 See **Report of the Proceedings of the Tribunal on the Matter of Article 113 of the Constitution and in the Matter of Justice B.S. Mumba** 19 - 20 June, 1984.

28 Mr. Justice Kabazo Chanda(resigned) is now a lecturer in the School of Law at the Univerity of Zambia.

29 The Judicature Administration Act, supra, note 26.

30 See the **Report of the Special Committee on Delays in the Administration of Justice and Delivery of Judgments in Zambia** March, 1993, Chaired by Mr. Justice Ernest Sakala of the Supreme Court, at page 25.

31. Supra, note 26.

32 Ibid, section 5.

33. Ibid, section 6.

34. Article 1(3)(4) of the Constitution.

35 For a full discussion of this type of Constitutional framework, see an Article entitled 'The Independence of the Judiciary: A Third World Perspective' by Yash Vyas in **Third World Legal Studies - 1992,** published by the International Third World Legal Studies Association and the Volparaiso University School of Law, Indiana, page 138.

36 Professors Dion Basson and Henning Viljoen refer to this as the principle of the **trias politika** which they consider to be of extreme importance-See supra note 1, p.169.

37 de Smith, S.A; **Constitutional and Administrative Law** Penguin Books Ltd, England, 1971,p. 40

38 Ibid, p 40.

39 Odoki,B. J., 'Terms and Conditions of Service of Judges: A Safeguard to the Independence of the Judiciary'; a paper presented to a Seminar organised by the **International Commission of Jurists** in Lusaka, November 1986.

40 Ibid.

41 Sakala, J.B., 'Tension Between Judicial Independence and Accountability', a paper presented to the Second Judicial Seminar held at Siavonga, Zambia 6-9 July, 1984.

42 **Craig, James T.**, 'Comment on Cases and Legislation: The Privileges of Parliament and the Constitution'. **Zambia Law Journal,** Vol. 3+4 (1971-72) Numbers 1 and 2, at 143 et seq.

43 **Fred M'membe and Bright Mwape v Attorney-General**, 1996/HN/1199 (Unreported), at p.20.

44 **The Post,** Tueday, 23 March, 1999 at p 3.

45 **Zambia National Holding Ltd and UNIP v. Attorney-General,** Supreme Court Judgment No. 3 of 1994 (Unreported) at page J7.

46 Ibid, page J8.

47 Hall Richard ., **The High Price of Principles: Kaunda and the White South**, Penguin Books Ltd, England 1969, pp 216-21.

48 Article 59 of the Constitution provides that the President may grant a pardon to any person convicted of any offence either free or subject to lawful conditions.

49 **Christine Mulundika and 7 Others v. The People** Supreme Court Judgment No. 25 of 1995 (unreported).

50 For a full discussion of the Public Order Act, see Ruedisili's article entitled 'Zambia's Elusive Search for a Valid Public Order Act: An Appraisal' in the **Zambia Law Journal**, Volume 25-28 1993-96 pp 1-65. It is significant to note that of the five judges who constituted the corum, the two judges who ruled in favour of the applicants were from one part of Zambia while the two dissenting judges came from another but same part of Zambia. One judge who contributed to the majority judgment came from a different part of Zambia. Without imputing any motive this would indicate a polarisation of the judiciary along ethnic lines when judges are faced with politicaly sensitive cases.

51 Ibid.

52 Vyas Yash - 'The Independence of the Judiciary: A Third World Perspective.', supra, note 35.

53 **The People v. Kambarage Mpundu Kaunda** 1990 / HP/ 119 (Unreported).

54 Supreme Court Judgment No. 1 of 1992(unreported).

55 **The Weekly Post** No 38 March 27 - April 2 of 1992 - front page. Suprisingly, Rodger Chongwe was in the same car with Kenneth Kaunda in Kabwe when Police opened fire on it at a rally in August, 1997. He had resigned from the MMD before this incident took place.

56 Ibid, **The Weekly Post,** Editorial Comment, p. 4.

57 See the **Report of the Special Committee on Delays in the Administration of Justice and Delivery of Judgments in Zambia**, March 1993, Chaired by Mr. Justice Ernest Sakala of the Supreme Court, at page 25.

58 The Times of Zambia, Friday 10 July 1998 page 1 bottom column. Mr. Justice Tamula Kakusa of the High Court at Lusaka held that the suspension of Dr. Ludwig Sondashi of the National Party from Parliament for six months was unconstitutional.

CHAPTER SIX
ACCESS TO JUSTICE

Introduction:

Access to justice is the right of an individual to use the due process of law. The due process of law requires the observance of the rules of natural justice through the rule of law. In the narrow perspective, the concept of access to justice entails the right to have a matter determined by a court of law. In a wider sense it involves a number of issues before, during and even after a trial.

Before a trial begins a litigant will require money to invoke the due process of law. For example, the services of a lawyer are usually needed and that costs money. Travelling to Court or to gather evidence costs money.

If at this preliminary stage a litigant has no adequate resources then access to justice is denied. During trial, litigants are entitled to a fair and, wherever possible, to a public hearing before an independent and impartial Court or tribunal. At this stage procedural aspects of a trial are important in that unless these are simplified and without unnecessary delay, access to justice becomes illusory. Furthermore, adequate financial or other resources and a fair trial before an impartial tribunal alone are not a **panacea** to the right of access to justice. To receive an effective remedy **per se** is not enough. The Court's judgment must be enforceable within a reasonable time if the enjoyment of access to justice is to be guaranteed.

Access to justice as a human right is critical in the judicial vindication of all other human rights. It is critical where human rights have been violated because where there is no access to justice it becomes impossible to seek redress.

It cannot be disputed that access to justice is a human right but in practice there are several impediments to the enjoyment of this critical human right.

This Chapter will examine those aspects of the Zambian judicial system relating to access to justice in both civil and criminal matters. It will also examine the international and regional instruments relating to access to justice since Zambia is a state party to some of these instruments.

Section 1 Access to justice as a Human Right

It is in recognition of the importance of access to justice that all human rights instruments at international, regional and domestic levels contain provisions for guaranteeing access to justice.

In many democratic states of today, access to justice has become of increasing importance. States have an obligation to ensure that access to justice is easily and reasonably available, especially to the indigent population and rural dwellers. Unless the poor and disadvantaged persons in any society are provided with meaningful access to justice, they may resort to extra-legal methods to redress their grievances. Much of the credibility of any justice system depends on how capable such a system deals with the problem of access to justice.

The right to an effective remedy and fair trial before a competent tribunal, therefore, implies that access to such tribunals or courts is readily and reasonably available, otherwise the enjoyment and protection of human rights becomes illusory.

A. The European Convention on Human Rights

The right of access to a fair and public hearing before an independent and impartial tribunal is one of the twelve rights and freedoms specifically guaranteed under the European Convention on Human Rights. [1] Article 13 of the Convention provides that:

> Everyone whose rights and freedoms set forth in this Convention are violated shall have an effective remedy before a national authority notewithstanding that the violation has been committed by persons in official capacity.

In its Article 6, the Convention extensively provides for the right to a fair trial which, inter alia, includes the right to defend oneself when charged with a criminal offence or

through legal assistance of his own choosing, or if he has no sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

As a result of these provisions the European Court of Human Rights which was established by the Convention, has dealt with a number of cases involving alleged violations of the right to access to court even by indigent litigants

In one of the early cases to be decided by the European Court of Human Rights in 1975, **Golder** was a prisoner who was refused premission by prison authorities to instruct a lawyer, presumably because the prisoner wanted to sue one of the Prison Warders. Upon petitioning the European Court, it was found that the right to a fair trial under Article 6 of the `Convention was violated because by implication the right to a fair trial means the right of access to a Court [2]

In a more recent case of **Canea Catholic Church v Greece** the Acting Bishop of Crete petitioned that the Church was refused permission to take legal proceedings because it had no legal personality in Canea.

The Church cited the provisions of Article 6(1) of the Convention. The Court found that there had been a violation of Article 6(1) of the Convention since there was a restriction of the Church's right of access to a Court.[3] Golder's case was cited and followed.

There are many other cases of alleged violations of the right of access to a Court which the European Court of Human Rights has dealt with since its inception. Suffice to say that other regional and domestic systems would do well to emulate the European Court in applying the Court's inovative approach.

B. The American Convention on Human Rights

The right to a fair trial is extensively provided for in Article 8 of the American Convention on Human Rights.[4] In particular Article 8(2)(e) provides that every person accused of a serious crime has the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law

provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law.

Like its European counter-part the American Convention also establishes a human rights Court, the Inter-American Court on Human Rights. Under Article 61 of the Convention, however, only State parties and the Human Rights Commission established thereunder have the right to submit cases to the Court. Individuals have no right to activate the Court. Their recourse is through the Commission which, after investigation, can decide whether the individual's application is meritorious enough to be submitted to the Court.[5]

C The African Charter on Human and People's Rights

The Organisation of African Unity (OAU) adopted the African Charter on Human and People' Rights as an affirmation that the promotion and protection of human rights is a matter of international concern. State parties to

the Charter undertake to ensure that individuals within their juridictions enjoy the rights recognised under the Charter. [6]

Article 7(1) of the African Charter provides that;

> 1. Every individual shall have the right to have his cause heard.....
>
> (c) the right to defence, including the right to be defended by counsel of his choice.....
>
> (d) the right to be tried within a reasonable time by an impartial court or tribunal.

One major criticism of the African Charter is that it appears to lay emphasis on the enjoyment of those human rights enshrined in it **subject** to **national law**. Terms such as "within the law"; "provided he abices by the law" occur frequently[7].

The main functions of the African Commission on Human and People's Rights are of a **promotional** nature. In recent years its investigatory role in individual complaints has increased. But because of the "confidentiality" provision of the Charter, decided cases on access to justice are difficult to assess.[8]

Section 2: Domestic or National Provisions

Most of Zambia's the domestic provisions to secure a fair and just trial are contained in Article 18, Part III of the Constitution, which provides for the protection of the fundamental rights and freedoms of the individual. Article 18(1) provides that;

> If any person is charged with a criminal offence then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

There is also provision for the accused person to be granted **legal aid** in accordance with the law enacted by Parliament or to defend himself in person or by a legal representative of his own choice. The provision under Article 18 bears a very close resemblance to the provisions under Article 10 of the Universal Declaration of Human Rights and Article 6 of the European Convention. However, the Zambian Article provides for numerous derogations. For example, Article 18(12) provides that:-

> Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of.....

Under this derogation, it is not a violation of the right to a fair trial if there is a national law which shifts the burden of proving particular facts from the prosecution onto the accused person. This is contrary to the provision of Article 18(2)(a) which states that an accused person shall be presumed innocent until proved or pleads guilty.

One such law which has evidently shifted the burden of proof from the prosecution to the accused person is contained in the 1973 Electoral Regulations. Under Regulation 61(b)(c) of the Electoral (Registration of Voters) Regulation, it is an

offence to be found in possession of another person's Voters Card without lawful authority. The onus of proving that the possession was with lawful authority lies on the accused person.

Before the 1996 Parliamentary and Presidential elections, the opposition, United National Independence Party (UNIP) went on a protest campaign and collected thousands of Voters' cards from its members to stop them from voting in the elections.[9] No arrests were made under the Electoral Regulations presumably, because the owners of the cards voluntarily surrendered them and therefore, those found in possession of the said cards were in possession with lawful authority of the owners.

The right to a fair trial as contained in Article 20(7) of the then Contitution of Zambia was considered by the High Court at Ndola in 1984 in the case of **Thomas Mumba v. The People.**[10] The Article provided that no person who is tried for a criminal offence shall be compelled to give evidence at the trial.

This right was extended under the Criminal Procedure Code which provided that an accused person in a criminal

trial who elects to say something in his or her defence could do so either on oath or by way of an unsworn statement. The accused person could even elect to remain silent.[11]

Thomas Mumba was charged with an offence under the Corrupt Practices Act, No. 14 of 1980. Section 53(1) of the Act had a provision to the effect that if an accused person elected to say something at his or her trial, then that person had to say it on oath only. Mr Justice Dennis Chirwa found that that restriction in the Corrupt Practices Act was in contravention of Article 20(7) of the Constitution. As such, the provision was unconstitutional and, therefore, null and void. Parliament promptly amended the Corrupt Parctices Act to comply with the judgment.

The right to a fair trial includes the right to legal representation. Article 18(2)(d) provides for legal representation for the accused person. However, this provision is derogated under Article 18(12)(b) which provides that where there is a law which prohibits legal representation before a subordinate Court for an offence under Zambian Customary law, then such prohibition shall not be construed to be a contravention of the said Article 18(2)(d).

The right of access to a fair trial is also denied to people held in so-called **lawful detention**. Such people are denied their right for a speedy trial "within a reasonable time" by a court or tribunal as provided for under Article 18(1). Recently, these derogations were fully exploited by the State in the on-going trial of the treason suspects in the attempted coup of October, 1997. State Security Forces were given extensive powers to detain people without trial under the state of emergency which followed the abortive coup.[12]

A The Criminal Process:

Whilst the Penal Code is the prime source of criminal law in Zambia, the Criminal Procedure Code, commonly referred to as the CPC, is the prime source of the criminal process in the country. The criminal process is one area where violations of human rights are rampant.

(i) Interrogation and Arrest

The Constitution of Zambia as well as the Criminal Procedure Code contain provisions for a speedy trial of any person charged with a criminal offence subject to derogations discussed above. In practice, the Police and the other law

enforcement agencies detain criminal suspects and, at the slightest excuse prolong their interrogations and use excessive force to extract confessions. The delays caused while under Police interrogations are compounded by rather vague terms such as "within reasonable time" and " without unnecessary delay" used in the Constitution. Moreover, these delays are aggravated during periods when regulations under a state of emergency are in force. For example, in Dean Mung'omba's case, the alleged coup detainees remained in detention for months before trial started.[13] There is urgent need to educate the Police and other law enforcement forces regarding human rights of suspects and internationally accepted methods of interrogation.

In one case which was brought to the personal knowledge of this reseacher on or about 7th October, 1997 a suspect, **Joseph Phiri,** was denied access to his relatives and subsquently died at Kabanana Police Post, North of Lusaka[14]. Denying access to relatives, friends or legal counsel is tantamount to denying the right of access to justice. It is a serious violation of an important human right. Denying access to relatives and friends amounts to denial of justice in that a relative or friend could invoke the process of a speedy trial.

(ii) Awaiting Trial

When a suspect is eventually charged, it is very rare that he or she will appear before a Court of law "within a reasonable time" or "without unnecessary delay". For example, in December, 1993, Lusaka alone was reported to have had over 1,000 suspects in its remand Prisons awaiting trial, some of whom had been waiting for years[15]. Unfortunately, an update of the current situation has not been easy to obtain due to lack of statistics from the relevant Ministry. These delays have caused congestion at the Remand Prisons as well as in the Courts.

The situation has been aggravated by the declaration of two states of emergency within six year when many detainees were kept in detention without trial for long periods. One such delay was the cause of a petition in the case of **Rupiah Banda and Steven Moyo** in the wake of the March 1993 declaration of the state of emergency. Banda and Moyo alleged and petitioned the High Court that they were kept in detention without charge or trial from 5th March 1993 to 24th April 1993. The High Court held in their favour and ordered damages and costs against the State. The State appealed to the Supreme Court. The outcome of the appeal is not yet known.[16]

(iii) Bail

Section 123 of the Criminal Procedure Code provides that when any person is arrested or detained or appears before a subordinate court, the High Court or the Supreme Court, he or she may, at any time while he or he is in custody, be admitted to bail upon providing sufficient surety or sureties to the satisfaction of the arresting officer or the court as the case may be. Article 13(3) of the Constitution provides that:

> Any person who is arrested or detained-
>
> (a) for the purpose of bringing him before a Court in execution of an Order of the Court; or
>
> (b) upon reasonable suspicion of his having commited, or being about to commit, a criminal offence under the law in force in Zambia; and who is not released shall be brought without undue delay before a Court.

In the absence of a specifically stated period by which an accused person must be taken before a Court, Chief Justice Doyle in **Re Thomas Cain** held that the words "as soon as is reasonably practical" in Article 27(1) of the then Constitution were intended to impact a sense of urgency. Cain was detained under the preservation of Public Security Act in February, 1974. He applied for a writ of **habeas corpus**. The Court ordered his release on the ground that the grounds of his detention were not furnished to him timeously, i.e within 14 days as stipulated by the Public Security Regulations.[17]

Before 1993, the offences of murder and treason were not bailable except through the High Court under the provisions of section 123(3) of the Criminal Procedure Code. Aggravated robbery was often included in this unbailable category. However, from 1993 any person charged with murder, misprison (concealing) of treason, treason felony, aggravated robbery or any other offence carrying a possible or mandatory death sentence is not bailable[18]. In addition, a provision under the Nacortic Drugs Act forbids the granting of bail for any cognisable offence under the Act[19]. In **Parekh's** case the Supreme Court found nothing unconstitutional in a provision which prohibited the granting of bail pending trial provided there was no unreasonable delay[20]. Unfortunately,

the Court did not define what would amount to unreasonable delay.

Apart from these Statutory denials of access to justice, the attitude of some Judges or Magistrates aggravates the process of obtaining bail. For example, in **Alexander Kamalondo's case** in Luanshya in which this writer was defence counsel, Magistrate Nsokolo could not entertain Kamalondo's application for bail pending appeal to the High Court because "I see no likelihood of the High Court upsetting the sentence and decision." The charge was one of simple assault. Although the Court's record does not mention this, the Magistrate also expressed the opinion that he could not grant Kamalondo bail because it was "only a few days after I had sent him to prison"[21]. Similary, in the **Mtonga case** at Chililabombwe, the trial Magistrate was reluctant to grant the prisoner bail and left for Mazabuka soon after sentencing the prisoner[22]. Mtonga was charged with defaming the President. He was found guilty and was sentenced to six months imprisonment. In the case of **William Steven Banda**, Mr. Justice Tamula Kakusa of the High Court in Chipata, refused to grant bail to Banda pending appeal to the Supreme Court[23]. Bail was eventually granted by a Bench of the Supreme Court. Generally, any person who is arrested or detained or appears before a Court may at any time while in custody or at any

stage of the proceedings in Court be admitted to bail. Such person must, however provide a surety or sureties to secure his or her appearance to do so by the Court.[24]

(iv) Nolle Prosequi

This is another area where access to justice is frequently denied to accused persons in the criminal justice system of the country. A **nolle prosequi** is a Latin phrase which literally means to be unwilling to prosecute or to be unwilling to proceed with prosecution.

Under Section 81(1) of the Criminal Procedure Code Chapter 88, it is provided that in any criminal case and at any stage thereof before verdict or judgment, as the case may be, the Director of Public Prosecutions may enter a "**nolle prosequi**" informing the court that he does not intend to continue with the proceedings. The accused is then discharged. But such discharge does not operate as an acquittal or as a bar to any subsequent charges against that person in respect of the same facts.

This prerogative power to enter a nolle prosequi is unchallengable in any Court. It is not subject to control by any Court. This principle was well settled in the English case of **R v. Comptroller of Patents**[25]. In Zambia the Supreme Court in the case of **Mbayo Mutwala** has laid it down that the Court has no power to require reasons to be furnished as to why the Director of Public Prosecutions (DPP) proposes to enter a **nolle prosequi**. A Court cannot therefore, refuse the exercise of that power by the Director of Public Prosecutions no matter how unreasonable the exercise of such power may be[26].

The statutory provision under the Criminal Procedure Code is in fact an off-shoot of the constitutional provision under Article 56(3) (c) which states that:-

> The Director of Public Prosecutions shall have power in any case when he considers it desirable so to do
>
> .....
>
> (c) to discontinue at any stage before judgement is delivered, any such criminal proceedings instituted or undertaken by himself or any other person or authority.

The discretion given to the Director of Public

tions under the ***nolle prosequi*** *principle can hardly*

ned if its exercise is reasonable and without ulterior
undue external influence. However, experience
n exercise is usually abused for one reason or

case of **The People v. David Somba** *and*
lya, the accused were charged with theft by
he prosecution had lined up eight witnesses and
them had given evidence the prosecutor entered a
osequi without explanation as indeed he was
not to.[27] The defence and the court could do nothing
t. A few days later the accused persons were re-
on the same charge and were taken before a different
the matter could not proceed and
were discharged

on the same charge and were taken before a different

ate. There, again, the matter could not proceed and
rotracted delays the accused persons were discharged
Section 88 of the CPC. The discharge was not a bar to
subsequent arrest on the same charge. One does not have
oe highly imaginative to see what was in the mind of the
rosecutor. He saw that the case was going against him and
vanted to have a second bite at the apple in another court [28]

[27] This writer was the defence Counsel in this case.

The discretion given to the Director of Public Prosecutions under the **nolle prosequi** principle can hardly be questioned if its exercise is reasonable and without ulterior motives or undue external influence. However, experience shows that such exercise is usually abused for one reason or another.

In the case of **The People v. David Somba and Dillax Bwalya**, the accused were charged with theft by servant. The prosecution had lined up eight witnesses and after six of them had given evidence the prosecutor entered a **nolle prosequi** without explanation as indeed he was entitled not to.[27] The defence and the court could do nothing about it. A few days later the accused persons were re-arrested on the same charge and were taken before a different magistrate. There, again, the matter could not proceed and after protracted delays the accused persons were discharged under Section 88 of the CPC. The discharge was not a bar to any subsequent arrest on the same charge. One does not have to be highly imaginative to see what was in the mind of the Prosecutor. He saw that the case was going against him and wanted to have a second bite at the apple in another court.[28] This writer was the defence Counsel in this case.

In the **Kambarage Kaunda case** the accused was originally charged with the offence of murder jointly with another person. The then newly appointed Director of Public Prosecutions filed fresh information in the High Court and the two accused persons were sent for summary trial. The DPP decided to reduce the charge to one of manslaughter for both accused persons. During the early stages of the trial, the charge against Kambarage's co-accused was dropped.

There was an outcry in some quarters of the public that the charge of murder was reduced to one of manslaughter because the DPP acted under political pressure to save the then President's son from being kept in remand prison pending trial since murder was an unbailable offence while manslaughter was bailable. The learned trial Judge reinstated the earlier charge of murder against Kambarage and proceeded with the trial allegedly to ensure that Kambarage could not obtain bail[29].

It cannot be disputed that such unchallengable discretionary powers can be abused in the absence of clear cut guidelines. There is need for modifications to the **nolle prosequi** principle in Zambia in order to provide checks and balances in the exercise of this discretionary power by the

Director of Public Prosecutions. This is so because the discharged person is still subject to re-arrest as was done in the **David Somba** case and possibly many more. This means that the accused person carries the burden of an indictment throughout his life.

In fact, more recently, the **nolle prosequi** has been used in politically sensitive cases, for the State to discontinue prosecuting accused persons where chances of succeeding appeared dim. For example, **Dean Mung'omba** and **Princess Nakatindi Wina** who were charged with treason for their alleged participation in the attempted coup of October 1997, were discharged under the nolle prosequi procedure. This reportedly prompted the learned trial judge, Justice Japhet Banda to remark that the **nolle** was entered in bad faith. The Judge was further reported as saying that he hoped that the "powers that be" would amend the law on **nolle prosequi** to prevent its abuse.[30] Nolle prosequis were also entered by the State in the case of former President Kenneth Kaunda and one of his bodyguards Kaulung'ombe. Dr. Rajan Mahtani of Ndola was also discharged through a **nolle prosequi**.[31] It is submitted that the Supreme Court should revisit its ruling in **Mbayo Mutwala** and allow Courts to

require reasons to be furnished as to why the DPP proposes to enter a **nolle prosequi**.

(v) Preliminary Inquiry

When a person is charged with an offence which is not triable by the Subordinate Court, such as murder or treason or if the High Court or the Chief Justice in any particular case so orders, a Subordinate court can hold a preliminary inquiry to determine whether or not the accused person should be put on trial [32]. Statements of witnesses at the preliminary inquiry are known as **depositions** and are in the witness's own words and must be taken down in writing. The accused person is allowed to put questions to every prosecution witness brought to Court. The accused person is also allowed to call his witnesses in defence [33]. He is at liberty to address the court at the end of the hearing either by himself or by his advocate. If at the close of the case, there is no sufficient evidence against the accused person then he must be discharged but such discharge does not operate as a bar to any subsequent charge in respect of the same facts [34].

If at the close of the case, the Court finds that on the evidence before it that the accused person should be

committed for trial then the magistrate frames a charge or charges and commits him for trial to the High Court. The accused person may be granted bail or can be sent to prison "for safe-keeping" [35]. The concept of safe keeping is a serious contradiction in the country's justice system bearing in mind the appalling prison conditions prevailing in Zambian Prisons to-day.[36]

During the trial at the High Court all those witnesses who deposed against or for the accused person and whose evidence is recorded, will be summoned to be heard all over again by both the prosecution and the defence. This process takes months or even years to conclude. Thus, the constitutional provisions which stipulate that an accused person charged with a criminal offence should be accorded a fair hearing "within a reasonable time" or "without unnecessary delay" are invariably rendered nugatory.

It cannot be said that the delay in concluding a preliminary inquiry is reasonable or necessary because in practice, the Subordinate Courts very rarely discharge accused persons after a preliminary inquiry presumably because in most cases the evidence is such that the case should have been sent for summary trial anyway.

In one preliminary inquiry before a magistrate in Kitwe, in which the writer acted as defence Counsel, the inquiry lasted from August 1979 to April 1980, a period of nearly nine months. It involved depositions of nineteen prosecution witnesses. At the close of the case, the three accused persons were committed to the High Court at Ndola to start **de novo**. The High Court trial started in June 1981 and lasted until December, 1982 when Judgement was delivered; a period of over three years from the start of the preliminary inquiry [37] This situation is typical of most Preliminary Inquiries undertaken in Subordinate Courts.

The purpose of conducting a preliminary enquiry through a Subordinate Court as provided under Sectionm 223 of the Criminal Procedure Code is, presumably, to allow for a preliminary "clean-up" so that the High Court is de-congested and thereby reduce delays. Unfortunately, this is rarely the case because in practice most magistrates are timid over the discharge of accused persons under a preliminary inquiry. They would rather pass the buck to the Court above.

Additionally, even if the Subordinate Court decides to discharge an accused person under the provisions of Section 230 of the Criminal Procedures Code, such discharge does not,

again, bar a subsequent charge against the dischargee in respect of the same facts. This is a return to the **nolle prosequi** situation. This procedure also resembles a discharge under Section 88(a) of the Criminal Procedure Code where a discharge does not operate as a bar to subsequent proceedings against the accused person on account of the same facts.

Besides, when the Subordinate Court finally sends the case for summary trial at the High Court, all those witnesses whose evidence is already recorded, will be summoned to be heard all over. By the time this happens, some witnesses will have died or disappeared and possibly, some records will have disappeared. This procedure certainly appears unconcerned with the individual's right to a speedy trial. It is also costly. Since the majority of Preliminary Inquiries end up in committing the accused to the High Court for summary trial, the PI should be abolished.

B. The Civil Process:

The procedures for civil litigation in human rights issues is provided for under Article 28 of the Constitution. As already stated above, any person who alleges that any of the

fundamental rights and freedoms enshrined in the Constitution have been or are likely to be violated, that person can apply to the High Court for redress. If the issue is raised in a Subordinate Court then, the aggrieved party can apply for the matter to be referred to the High Court in accordance with the provisions of Article 28 clause 2.

Under the provisions of **The Protection of Fundamental Rights Rules** of 1969 an application under Article 28 of the Conctitution must be made by way of a Petition which must be filed in the Registry of the High Court. The Petition must set out the name and address of the Petitioner; name and address of each person against whom the redress is sought; the grounds upon which such redress is sought including particulars of the facts to be relied upon and the nature of redress being sought [38].

A copy of the Petition must be served on each person against whom the complaint is laid. In case of an application against the State, the Petition must be served on the Attorney-General. In other words, the Attorney-General must be made a party to the Respondent.[39]

The Petitioner(s) may file an affidavit(s) in support of the application to which the Repondent(s) may file a Reply. The High Court will then set down the Petition for hearing as soon as convenient. Usually, such applications are given priority consideration by the Court. The Petitioner and the Respondents may appear in person or by a legal representative.[40]

The current cost of filing such a Petition in the High Court is an equivalent of ten United States dollars and for filing an affidavit or additional affidavit is an equivalent of one United States dollar. All fees payable on filing any document must be in cash. The fees must be paid before the document is filed in the Registry otherwise the document will not be accepted.[41]

The High Court is empowered to "make such orders, issue such writs and give such directions" for the purpose of enforcing or ensuring the enforcement of any fundamental rights and freedoms alledgedly violated[42]. This provision does not, apparently, exempt the State from the orders, writs or directions of the Court as the case may be.

The High Court in the **Zambia National Holdings** case considered the apparent contradiction between the provisions of Article 28(1)(b) which empowered the Court to issue any Orders, Writs or Directions and those of the State Proceedings Act, Section 16(1)(i) which deny the Court such powers in respect of **injunctions** and relief for **specific performance** against the State. Mr. Justice B.K. Bweupe (now Deputy Chief Justice) held that "the provisions of Section 16(1)(i) of the State Proceedings Act contravened the provisions of Articles 28(1)(b) and 94(1) of the Constitution by limiting the powers of the Court" The learned trial judge struck down the Statutory provisions as being unconstitutional[43].

Surprisingly, the Supreme Court disagreed with the learned trial judge. Although the apex Court observed that there was now "a growing school of thought against the continued existence of State immunity against injunctive relief and other coercive orders" it felt that it would be " unrealistic to expect that the state can be proceeded against in all respects as for a subject" [44]. The question is why not? With all due respect, and upon serious reflection, it is submitted that the trial judge arrived at a correct decision. Where there is a conflict between the Constitution which is the supreme

law of the land and a Statutory provision, such as an Act of Parliament, the Constitution must prevail.

Section 3 : Impediments to Access to Justice

The right of access to justice is a rare commodity in many African states including Zambia, due to numerous constraints or impediments . In Zambia the situation is aggravated by the massive economic, educational and other social disparities among the country's communities. This Section will examine some of these impediments and will evaluate their effect on the right of access to justice in the country's justice system.

A Constitutional Derogations

The most serious Constitutional derogations which impede the right of access to justice espacially in criminal matters are contained in Article 18. This is especially so during a State of emergency when a detainee can be kept in detention without charge or trial for a long period. A number of statutes also provide serious impediments to the enjoyment of the right of access to justice. Among the most serious of these statutes are: The Emergency Powers Act: the

Preservation of Public Security Act; the State Security Act and the Immigration and Deportation Act. These Statutes have already been discussed in Chapter Four when examining the judicial implementation of human rights in Zambia.

B. Economic and Social Disparities

Many indigent litigants have no or very little access to the Courts or other institutions which could assist them, such as the Human Rights Commision or human rights motivated Non-Governmental Organisations (NGOs). There are no guarantees for economic and social rights under the Zambian Bill of Human Rights except under the **non-justiciable** Directive Principles of State Policy and the Duties of a Citizen[45].

C Illiteracy and Attitudinal Aspects

Accused persons in criminal matters or litigants in civil matters often delay in obtaining legal representation due to ignorance or illiteracy. Even though tremendous progress in education has been made in Zambia since independence, the level of illiteracy is still high especially in rural areas. Some of the negative aspects of litigation are a product of the long

period of one-party state covering 27 years when members of the public were not assertive enough in pursuing their rights.

D. Cumbersome Procedures

The right of access to justice is always imperilled where Court or other intitutional procedures are cumbersome and sometimes incomprehensible to the ordinary litigant. The demise of most indigenous procedures which were characterised by informality and simplicity meant that such procedures which were appropriate for local cultures had to be abandoned in favour of imported procedures which were perceived as meeting 'civilised' standards of 'fairness'. Current unnecessary technicalities ought to be minimised if not eliminated altogether.

E. Cost of Litigation

In the absence of an effective legal aid system and in view of the massive economic and social disparities, the right of access to justice will continue to be skewed against the majority but indigent litigants.

The need for expert assistance at all stages of civil and criminal litigation is a necessary pre-requisite. Thus, in most cases the retention of the services of a legal practitioner is imperative. The engagement of a legal practitioner entails taking brief, taking out a summons or a petition and serving the Court process, attending to trial, usually a protracted affair with incessant adjournments. The whole process leads to legal expenses which are often out of the reach of poor litigants.

Legal costs do not only consist of lawyers' fees. They also include Court fees and fees for witnesses. In addition the loser is usually made to pay costs to the winner which nowadays is always in millions of kwacha. For example, in the case of **Dr. Mushota and Katyoka v. Dr. Kenneth Kaunda** the High Court at Ndola granted an order for the Plaintiffs to pay into Court a sum of ten million kwacha as **security for costs** before the commencement of the trial. That was to ensure that in the event of the Palintiffs losing their case, they would be in a position to pay the winner.[46] The justice system must take measures which will provide for affordable costs to ensure that the right of access to justice is available to all people regardless of their status in society.

F Delays

It is common knowledge that the phenomenon of **delays** in the country's justice system is growing by leaps and bounds every year. This phenomenon appears to have entrenched itself in the justice system due to almost intractable factors. The structure and functions of the Court system itself are a major contributor; a matter of too many cases chasing too few judges. The calibre of judicial officers and unattractive conditions of service especially in the lower ranks of the system all have contributed to the current **delays** in the justice system of the country.

Admittedly, some delays are caused by other institutions such as the Police, the office of the Director of Public Prosecutions(DPP) and the Prison Service. The legal profession too has contributed to the malaise. Lawyers often apply for adjournments through **ex-parte** procedures at the slightest excuse and judges readily oblige to the adjournments at the expense of litigants.

G. Rural Areas

Access to justice for rural dwellers is an excrutiating experience. During the trial of **William Steven Banda** at

Chipata in a case involving his **deportation,** the defence Counsel had to travel by road from the Copperbelt on more than eight occasions between November 1991 and November 1992. On four of those occassions the journeys were undertaken at night and on one of them the car had a two-wheel puncture which forced Counsel to spend a night in the car in the bush between the Luangwa Bridge and Kacholola Township[49]. In the Maimisa case at Chadiza, in the Eastern Province, Counsel had to make daily trips from Chipata to Chadiza on an 80 kilometre dusty road every month from January 1992 to April 1993. There were twenty one persons including three women accused of rioting.[48]

Upon some of the accused being found guilty of **riot** the prisoners were transferred from Chadiza to Katete Prison on the same day. Defence Counsel had to travel to Chipata to file the appeal in the High Court on behalf of the prisoners, obtain bail and drive all the way to Katete to have them released pending appeal. In the two days that the running about took place, defence Counsel covered over 200 kilometres most of them on dusty roads between Chipata, Chadiza and Katete. The High Court Appeal was finalised in June 1994.[49]. Had it not been for the financial support rendered to the accused persons by their political party none of them could

have afforded the **cost** of access to justice which was involved. Such ordeals are a very common feature in all rural areas of the country. This explains, in part, why lawyers are absent in rural areas and the right of access to justice is invariably denied to rural dwellers and indigent litigants.

H. Corruption

Corruption exists in all societies but its impact in developing countries is more severe than in developed ones because of the colossal economic and social disparities that obtain in these countries. Here, the concern is with corruption in the justice system of the country.[50] It is common to hear of officials who are bribed in order to mislay files or exhibits. It is equally common to hear of lawyers who bribe their way to win cases on behalf of their clients although this is difficult to prove because of the highly secretive manner in which such bribes are effected. Occasionaly, there have been heated debates on corruption in the National Assembly.[51]

In Zambia the social and economic evils of corruption were recognised as far back as 1980 when the Corrupt Practices Act was enacted. However, the anatomy of judicial

corruption is so intricate that legislative enactments alone cannot achieve meaningful results[52].

In 1996 the Government reviewed the performance of the Anti-Corruption Commission and, apparently, concluded that its operations and reporting procedures needed re-visiting. As a result a new Anti-Corruption Commission Act was enacted which established an autonomous Commission.[53] Before the 1996 Anti-Corruption Commission Act was enacted, the Legislature enacted the Parliamentary and Ministerial Code of Conduct Act as stipulated under Article 52 of the Constitution [54].

The Parliamentary and Ministerial Code of Conduct Act however is primarily concerned with the conduct of Ministers, Deputy Ministers and members of the National Assembly. Nevertheless, since Section 4 (c) of the Act forbids a member of Paliament from "exerting improper influence in the removal of a public officer" the Act has some positive impact on judicial corruption by warning the influential members of society against exerting improper influences on public officers including judicial personnel.

In Zambia's judicial circles, the impact of corruption tends to be more prevalent at the bottom of the ladder because of poor conditions of service. In fact, it is at this level where the majority of indigent litigants are found. Suprisingly, the Special Committee on **Delays in the Administration of Justice and Delivery of Judgments** which was appointed by the Law Association of Zambia in 1992 and which was chaired by a Supreme Court Judge, never mentioned corruption as one of the causes of delays in the administration of justice in the country [55].

I Enforcement of Judgments

Without an effective system of enforcing judgments, the right of access to justice becomes illusory. In Zambia the methods or procedures for executing or enforcing judgments are many and they usually follow the English system. There are two types of judgments, namely, interlocutory and final judgments. Some of the processes under these two categories are quite cumbersome and demand well tutored expertise in dealing with such matters as writs of fieri facias, writ of eligit, attachments or garnishees and specific performance[56]

Conclusion

Access to justice in Zambia, as elsewhere, is largely tilted against the indigent litigant or accused person. This is due to numerous factors, most important of which are incompetent investigatory systems in criminal matters, cumbersome legal procedures and technicallities in civil matters and case overloads in courts especially at the Subordinate Court and the High Court levels, particularly in Lusaka[57].

The high cost of litigation in the face of an almost moribund legal aid or **pro-bono** system contributes substantially to the denial of the right of access to justice. Equally important is the negative impact which corruption inflicts upon the justice delivery system. For rural dwellers, long distances from Local and Subordinate Courts to the High Court and Supreme Court render an added infliction against the right of access to the justice system.

The solutions to these problems are as difficult as the problems themselves. Again, this is due to a multitude of factors such as attitudinal problems, economic, social and even political influences. Lack of educational attainments or

illiteracy for the majority of the population especially among rural dwellers aggravates the issue.

With this array of impediments the right of access to justice in the country's justice system is still of great concern to all human rights stakeholders.

CHAPTER SIX

End Notes

1. The European continent was the first to establish a regional human rights system. It adopted its Convention on Human Rights in 1950. It also adopted the European Social Charter in 1961.

2. **Golder v. United Kingdom** Series A No. 18 1975. 1 EHRR 524.

3. **Canea Catholic Church v. Greece** (143/1996/762/963) reported in European Human Rights Law Review, Issue 3 of 1998, Sweet & Maxwell Ltd, pp332 - 333.

4 The American continent was the second to establish a human rights system. It adopted its Convention on human rights in 1969.

5 Davidson, Scott., **Human Rights,** Open University Press, Buckingham (1993), p.134 et seq.

6 The African Charter on Human and People's Rights was adopted at the 18th Conference of Heads of State and Government, Nairobi, Kenya, on 27th June, 1981 - See **Human Rights in International Law,** Council of Europe Press, 1992, p. 342

7. For a fuller discussion on the short-comings of the African Charter on Human and Peoples Rights - See Robertson and Merrills supra note 1, pp250 - 53.

8. Article 59(1) of the African Charter.

9. **Akashambatwa Mbikusita Lewanika and 4 Others v. Frederick Jacob Titus Chiluba,** Supreme Court Judment No. 14 of 1998 at p.67.

10. **Thomas Mumba v. The People** (1984) ZR 38.

11. Cap. 88 (formerly 160) Section 207(1).

12. **Afronet, Zambia Human Rights Report,** 1997, pp 22-23.

13 **Dean Namulya Mung'omba v. The Attorney-General,** 1997/HP/2617(unreported).

14 Upon visiting the Police Post, it was confirmed that 27 year old **Joseph Phiri** died at Kabanana Police Post while in Police custody as alleged. A post mortem examination was conducted at University Teaching Hospital (UTH) in Lusaka which stated inter alia, that the deceased had severe internal bleeding.

The matter was reported to the then newly created Permanent Human Rights Commission which promised to carry out relevant investigations.

15. **The Times of Zambia** December 7, 1993

16. **Rupiah Bwezani Banda and Steven Phaniso Chinombo Moyo v. The Attorney-General** 1993/HP/19 and 1994/HP/29 (unreported).

17. **In Re Thomas James Cain,** (1974) ZR 71.

18 See **The Criminal Procedure Code(Amendment) Act** No. 35 of 1993.

19. **The Narcotics Drugs and Psychotropic Substances Act** No. 37 of 1993, Section 23.

20. **Chetankumar Shantkal Parekh v. The People,** Supreme Court Judgement No. 46 of 1995 (Unreported) but very briefly reported in the **Zambia Law Journal,** Volume 25 - 28 1993-96. p 155.

21. **The People v. Alexander Kamalondo.** The accused was found guilty but despite being a first offender and despite Counsel citing High Court authorities about the treatment of first offenders, the Margistrate sentenced him to 6 months imprisonment without the option of a fine. The prisoner had to apply to the High Court at Ndola where Mr. Justice David Lewanika granted him bail. On appeal to the High Court the sentence was set aside and in its place the appellant was fined K10,000. See **HNA 36 of 1992.**

22 **The People v. Augustine Mtonga** (1991)EI/226/91 at Chililabombwe Magistrates Court.

23 **William Steven Banda v. Chief Immigration Officer and the Attorney-General,** 1991/HJ/12 at Chipata. Banda was detained in prison at Chipata pending deportation as a prohibited immigrant. He petitioned against the impending deportation but lost his petition. He appealed to the Supreme Court where his appeal was dismissed with costs - See Supreme Court Judgment No. 16 of 1994. corum Deputy Chief Justice B.K. Bweupe sitting with Supreme Court Judges Chaila and Muzyamba.

24. Criminal Procedure Code, Cap. 88, Section 123.

25. (1889) 1QB 909.

26. **Director of Public Prosecutions v. Mbayo Mutwala Augustine** (1977) ZR 287.

27. Ibid.

28 **The People v. David Somba and Dillax Bwalya** Before Magistrate Mr. Mebeelo Kalima at Lusaka. Unfortunately, the case record did not show the cause number.

29 **The People v. Kambarage Mpundu Kaunda** 1990/HP/119 (unreported). On appeal Kambarage was acquitted of murder by the Supreme Court. No lesser charge was substituted.

30 **The Post**, Tuesday, December 22, 1998 pp 1 and 4.

31. Ibid, Wednesday, July 15, 1998 pp 1 and 6.

32. See Sections 10,11 and 223 of the **Criminal Procedure Code,** now Cap 88 formerly Cap 160.

33. **Criminal Procedure Code** Cap 88, Sections 228 and 229.

34. Ibid, Section 230.

35 Ibid, Section 231.

36. The Munyama Human Rights Commission of Inquiry 1993, Chapter 5, para 5.2.

37. **The People v Francis Mpezeni & 2 Others** 1981/HN/12 at Ndola and Supreme Court Appeal No. 71 of 1983 (both unreported) This was a case of aggravated robbery The accused were committed to the High Court at Ndola because at that time there was no High Court at Kitwe.

38. See Statutory Instrument No. 156 of 1969 Sections 2 and 3.

39. Ibid, section 4(2)(3).

40. Ibid, section 5(1)(2).

41. The High Court(Amendment) Rules, 1998, Statutory Instrument No. 69/98. See also The Industrial Relations Court (Amendment) Rules, 1995, Statutory Instrument No. 157 of 1995.

42. Article 28(1)(a)(b) of the Constitution.

43 **Zambia National Holdings Limited and United National Independence Party v. Minister of Lands and Attorney-General** 1992/HP/611 (unreported) at page J23.

44. Ibid - See Supreme Court Judgment No. 3 of 1994 at page J8.

45. See Part IX, Articles 110 - 113 of the Constitution.

46. **Dr. Remmy Mushota and Patrick Katyoka v. Dr. Kenneth Kaunda, General Malimba Masheke and the Attorney-General**, 1996/HN/1463 (unreported).

47 **William Steven Banda v. The Chief Immigration Officer and the Attorney- General** (1991/HJ/12 (unreported).

48 **The People v. Chiwele Maimisa and 20 Others** Chadiza Magistrates Court Case No. SXD /3 of 1992. This was the case involving the alleged beating up of Mr. Michael Sata during the burial of the late Shart Banda, UNIP M.P for Chadiza.

49 High Court at Chipata appeal No. HJA/01/94. All the 14 prisoners were acquitted of the charge of riot but were found guilty of the minor offence of conduct likely to cause a breach of the peace and fined K50 each. It took 2 years to dispose of the case during which time one prisoner died while on bail.

50 Chanda, Alfred W., 'Human Rights in Zambia's Third Republic: An Overview' a paper presented at a Seminar held at the Norwegian Institute of Human Rights, Oslo, Norway, 8 June, 1995 p. 18.

51. See, for example, Parliamentary Debates, No. 91 of the 1st Session of the National Assembly, 16 June to 9, July 1992 on the purchase of State House furniture, the Maize Importation Fund and the Fertilizer Fund.

52 **The Anti-Corruption Commission** was established under the **Corrupt Practices Act** No. 14 of 1980 mainly to make comprehensive provision for the prevention of corruption in the country.

53. See Act No. 42 of 1996.

54 See Act No. 35 of 1994.

55. The Special Committee was chaired by Supreme Court Judge, Mr. Justice E.L Sakala. The part of the report which deals with Criminal Jurisdiction is at pp. 13-16.

56. See Care, R.G. and Fluck, D.W, **Civil Procedure in the High Court for Zambia**, Kenneth Kaunda Foundation, Lusaka, 1986.

57. An attempt has now been made to simplify these procedures through Statutory Instrument No. 69 of 1998 under which **The High Court (Amendment) Rules, 1998** have been issued. The impact of the new rules has yet to be seen.