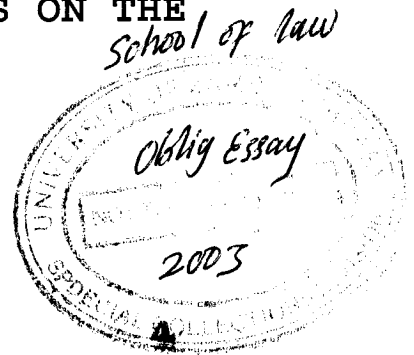


THE ADVERSE EFFECTS OF LACUNAS ON THE
ZAMBIAN
LEGAL SYSTEM



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BEING A PAPER SUBMITTED IN PARTIAL FULFILMENT OF THE
EXAMINATION REQUIREMENTS FOR THE DEGREE OF BACHELOR OF
LAWS [LL.B] OF THE UNIVERSITY OF ZAMBIA

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November 2003

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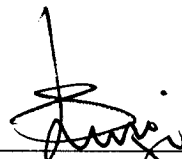
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17/11/2003

Date



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DEDICATION

First and foremost my gratitude and praise goes to God-the almighty for guiding me through life and for answering my prayers of becoming a lawyer. I will always praise. To my mother and father, I thank you for bringing me into this world and for your support throughout the years, Mr. and Mrs. Mwale currently in Bulawayo, Zimbabwe your inspiration and support can't be explained in words. To my brothers and sisters especially the younger ones, I have led the way so it is for you to follow. Keep working hard; you guys have lots of potential. Keep the faith! Once again, I thank God for granting me favour.

ACKNOWLEDGEMENT

I would like to thank my learned Supervisor, Mr. Steven Lungu for his guidance both in this obligatory essay and the practice. Also for his patience, encouragement, understanding and for treating me well during my days as a law student. To him, I say keep on inspiring others as you have done to me. To Mr. A.J. Shonga[Jnr], managing partner of Shamwana and Company, I give him a standing ovation, he taught me to be counsel. I thank Mr. Shonga for believing in me, for letting and according me an opportunity to work under him in all my days of law school for this I will forever be grateful. To my classmates especially Sydney Imasiku, Steven Simwanza, Noel Simwanza, Morgan Mukwasa and Sukwana Lukangaba, thank you for propounding the law along my side. My lecturers, you are the best, thank you for passing on the knowledge to me. To my friends on campus; Augustine Mwale, Mulako Milupi, Mathew Nyirenda, Dr. and Mrs. Yerokun, thank you for your support and God bless you all.

CHAPTER ONE

1.1 INTRODUCTION

The essence of every legal system is to protect the aggrieved individual, uphold the rule of law and act as an instrument of protecting legally protected interests. It therefore follows that any lapse in the laws of a country can adversely affect the proper delivery of justice in its legal system. A legal system devoid of remedies can be catastrophic to the orderliness of any society. The Zambian legal system is no exception. Our laws are manifestly compounded with gaps in their salient provisions, which have rendered our legal system susceptible to manipulation and lack of remedies. These gaps hereinafter expressed as *lacunas* form the core of this research paper including matters incidental thereto.

1.2 THE CONCEPT OF A LEGAL SYSTEM IN ZAMBIA

1.2.1 WHAT IS A LEGAL SYSTEM

The system of governance in every country is conditioned and put in the right perspective by the proper functioning of a legal system. Every legal system is constituted by many components in an integrated structure. They all play a

key role in ensuring that all is well in the administration, interpretation and adjudication of various laws applicable to different situations. It is in this light that the prevailing laws in any country should be unambiguous and worded in such a manner so as not to leave any room for manipulation. In other words, laws must be comprehensive enough so as to cover exigencies, which might arise before our courts of law in interpreting the law. It is settled that a legal system constitutes an individual system determined by an inner coherence of meaning, an integrated body of rules. A multitude of individual legal norms may not amount to a legal system unless they are linked with each other in an integrated structure.¹ This description emphasizes an integrated body of rules and structure.

1.2.2 HISTORICAL DEVELOPMENT

Historically, the development of the Zambian legal system can be traced from the colonial legacy left by the British as the former colonial master. The legitimate source of British occupation in colonies came via statute as enacted by the British Parliament. It is settled history that when

¹ W. Friedman.1967. *Legal Theory*, Delhi; Universal Law Publishing Company P. 16

Britain by settler occupation colonized parts of Africa, it passed legislation under which the Crown exercised authority over them. These were the **Foreign Jurisdiction Acts**. The colonies also became subject to the Common law (unwritten) of England². **Section 1** of the **Foreign Jurisdiction Act of 1843** stated:

'To hold, exercise, and enjoy any power or jurisdiction which Her majesty now hath or may at any time hereinafter have within any country or place out of Her Majesty's dominions, in the same and as ample a manner as if Her Majesty had acquired such power or jurisdiction by the conquest or cessation of territory.'

This section, gave the Crown unfettered legislative power over colonies. In Zambia, British influence came through the declaration of Barotseland as a protectorate in 1899 and through the subsequent Orders-in-Council. The **Barotseland-North-Western Rhodesia Order-in-Council 1899** established, a more elaborate judicial system in the territory to which it pertained. Provision was made for the appointment of judges and magistrates, English law was to

² 'How Zambia Acquired a Dual Legal System' by Lilian Mushota .2002. *Legality Journal*, Lusaka; UNZA Press P.25

apply except where otherwise stated in the Order and the High Commissioner was empowered to issue such proclamations, as he found necessary to maintain order in the territory.³ At this stage, tribal courts had not been recognized officially.

By virtue of the **North- Eastern Rhodesia Order in Council of 1900**, a High Court was created with civil and criminal jurisdiction over all cases in the territory.⁴ Native courts were created in 1936 to 1960. At post independence, the structure of the Zambian judiciary assumed a different character. The independence constitution of Zambia established the Judicial Service Commission under the chairmanship of the Chief Justice with important advisory and executive powers over judicial appointments and designed to ensure that such appointments were made free from political influence⁵. In 1973, the annexation of the United National Independence Party's constitution to the Republican Constitution compromised the autonomy of the legal system in Zambia. The 1991 constitution removed the one party state and restored multi-partism, which initially was there at independence. In 1996, the constitution was

³ The Evolution of Zambian Courts by E.L. Hoover, J.C. Piper and F.O. Spalding.1970.*Zambia Law Journal Vol.2*, Lusaka; University of Zambia PP. 5-6

⁴ Ibid P.6

⁵ Ibid P.20

re-enacted and today a commission of inquiry has been set up to adopt another constitution under third President of the republic, Levy Mwanawasa.

1.2.3 DUAL LEGAL SYSTEM

The most distinguishing fact in the Zambian legal system unlike in developed countries or other jurisdictions is that there exists a dual legal system. It implies that in Zambia English Law is applied side by side with customary law. As a former British colony, Zambia adopted the Westminster kind of a legal system with a few modifications in order to fuse in customary law.

Historically, the concept of a dual legal system started in the Gold Coast in 1874, the English overloads imposed a variety of English law upon their subject territories- a narrow, truncated version of English law, with a broad exception of customary law. Customary law applied to Africans, who almost entirely lived and worked in the subsistence sector of the economy⁶. Like these early

⁶ Law and Stagnation in Africa by R.B. Seidman.1973. *Zambia Law Journal* Vol.5, Lusaka; University of Zambia P. 40

beginnings, both English law and customary law are applied simultaneously in the Zambian legal system.

The history of judicial administration in Zambia between 1889-1924 shows that our court system was once under the control of the British South Africa Company (BSA), which in its royal charter recognized native laws. The Royal Charter of Incorporation of the British South Africa Company stated:

'in the administration of justice to the said peoples or inhabitants careful regard shall always be had to the customs and laws of the class or tribe or nation to which the parties respectively belong, especially with regard to the holding, possession, transfer and disposition of lands and goods, and testate or intestate succession thereto, and marriages, divorces, legitimacy, and other rights of property and personal rights, but subject to any British laws which may be in force in any of the territories aforesaid and applicable to the peoples or inhabitants thereof.'⁷

⁷ *The Royal Charter of Incorporation of the British South Africa Company*, October 29, 1889 S.14

The thrust behind the granting of the **Royal Charter** to the BSA Company by Queen Victoria was that it was too expensive a venture for the crown to undertake on its own to colonize foreign territories, which were to become part of the British Empire. John Cecil Rhodes as chief executive of the BSA Company shielded his commercial interests behind the said company and undertook the task of acquisition on behalf of the crown. What happened later is not the subject of this paper.

Today, customary law is still recognized in the Zambian legal system. Important to note though, is that the applicability of customary law is qualified in that it must not be repugnant to natural justice and morality. The **Local Court Act**⁸ states:

' Subject to the provisions of this Act, a local court shall administer-

- (a) the African customary law applicable to any matter before it in so far as such law is not

⁸ Chapter 29 of the Laws of Zambia

repugnant to natural justice or morality or incompatible with the provisions of any written law.'⁹

This section is referred to as the repugnancy rule. It outlaws certain customs, which are considered to be uncivilized.

With respect to the dual legal system, Professor Kent observed, such a dual legal system may well need to continue for many years but the system more and more tends to contact each other and at times to conflict as the country evolves socially and economically. This clearly shows that the dual legal system has brought about serious conflict in relation to English received law.

1.2.4 THE ROLE OF THE CONSTITUTION

The major role of the Constitution of Zambia is that it defines organs of government, creates constitutional offices, bill of rights inter-alia. Like in the past, our legal system is influenced by what the legislature enacts as law. The legislature like the executive and the judiciary is a creature of the Constitution. This implies

⁹ Ibid. Section 12(1)(b)

that no act of the three organs of government should be ultra vires the Constitution.

The Zambian **Constitution**¹⁰ states:

'The legislative power of the Republic of Zambia shall vest in Parliament which shall consist of the President and National Assembly.'¹¹

This article implies that the primary source of law in Zambia is that which is enacted by our unicameral legislature. What is cardinal to note is that all statute law is subject to interpretation before courts of law. However, our legal system is cognizant of the fact that all laws in our jurisdiction are subject to the grand law in Zambia, ours, being a constitutional democracy. The Constitution states:

'This constitution is the supreme law of Zambia and if any other law is inconsistent with this constitution that other law shall to the extent of the inconsistency be void.'¹²

¹⁰ Chapter 1 of the Laws of Zambia

¹¹ Ibid. Article 62

¹² Ibid. Article 1(3)

This article endorses the supremacy of the Constitution being above any law in Zambia. Our legal system via the courts has in a number of occasions risen to declare certain acts as being unconstitutional. For instance, in the case of **John Banda V. The People**¹³, it was held that corporal punishment is an inhuman and degrading punishment, which violates **Article 15** of the Constitution.

This illustrative case like many others demonstrates that our legal system is bound by the constitution.

1.2.5 NATURE AND DEFINATION OF LACUNAS

It is not mendacious to state that Zambian laws bound in 26 volumes are riddled with many lacunas'. A *lacuna* is defined as a blank in writing¹⁴. Simply put, it refers to a gap in the law. This means that were there is no prescription by a law then there is no remedy. Our laws have tried to cure this ailment, which *prima facie* suggests that the problem has been addressed. For instance, in matters of procedure, the presence of *lacunas*' in relation to the same is remedied by **Section 10** of the **High Court Act**¹⁵, which states:

¹³ HPA/06/1998 (Unreported)

¹⁴ E.Jowitt.1960.*The Dictionary of English Law*, London; Sweet and Maxwell P. 1050

¹⁵ Chapter 27 of the Laws of Zambia

'The jurisdiction vested in the court shall, as regards practice and procedure, be exercised in the manner provided by this Act and the Criminal Procedure Code, or by any other written law, or by such rules, order or directions of the court as may be made under this Act, or the said Code, or such written law, and in default thereof in substantial conformity with the law and practice for the time being observed in England in the High Court for Justice.'

This section has been amended by **Act No.18 of 2002** by insertion of a new proviso, which states:

'Provided that the Civil Court Practice 1999 (Green Book) of England or any other civil court practice rules issued after 1999 in England shall not apply to Zambia unless they relate to matrimonial causes'.

This proviso now limits the importation of procedure to 1999.

It is by virtue of said section that any legal practitioner can invoke or apply rules under the **Supreme Court Practice** 'white book' to import procedure where our laws are silent.

The most common instance whereof our courts have been moved is in relation to judicial review proceeding under **Order 53** of rules of the Supreme Court as obtaining in England. In the case of **Reverend Lameck Josua Kausa V. The Registrar of Societies**¹⁶, proceedings under judicial review were sought. It was held that in matters of practice and procedure, in the absence of any rules on the matter in our laws, the procedure to be adopted should be in substantial conformity with the law and practice for the time being observed in England in the High Court for Justice.

1.2.6. RECEPTION STATUTES

The use of reception statutes is of paramount importance in the Zambian legal system. These statutes have helped fill in the gaps in Zambian laws. At pre and post independence, English law has been extended to Zambia by virtue of the reception statutes. For instance, **Section 11** of the **High Court Ordinance** stated:

Subject to the order in Council and to any local enactments, the Common law, doctrines of equity and the statutes which were in force in England on the 17th August

¹⁶(1977) ZR 195

1911 (being the date of the commencement of the Northern Rhodesia Order in Council) shall be in force within the jurisdiction of the court.'

This Ordinance was at post independence enacted verbatim as the **English Law Extent of Application Act**¹⁷.

1.2.7. **ENGLISH LAW EXTENT OF APPLICATION ACT**

The **English Law Extent of Application Act** renders English law principles prior to 17th August 1911 operative as law in the Zambian legal system. This implies that any statute, which was enacted before 17th August 1911, is applicable to this jurisdiction. A good example is the **Partnership Act 1890**, which applies to Zambia. This is in contrast with a country like India, a former British colony that enacted its own **Partnership Act** in 1932. Other English law principles like Common law and equity are also applicable. **Section 2** of the **English law Extent of Application Act** states:

'Subject to the provisions of the Constitution and to any other written law-

¹⁷ Chapter 11 of the laws of Zambia

- (a) the common law
- (b) the doctrines of equity ;and
- (c) the statutes which were in force in England on 17th August, 1911 (being the commencement of the Northern Rhodesia Order in Council, 1911); and
- (d) any statute of later date than that mentioned in paragraph © in force in England, now applied to the Republic, or which hereafter shall be applied thereto by any Act or otherwise; shall be in force in the Republic.'

The wording is similar to the **High Court Ordinance** already referred to. In 2002, the **English Law Extent of Application Act** was amended to include a new paragraph (e), which reads:

'the Supreme Court Rules of England in force until 1999: Provided that Civil Court Practice 1999 (The Green Book) of England or any other civil court practice rules issued after 1999 in England shall not apply to Zambia except in matrimonial causes.'

This recent amendment brings a new dimension to the extension of English law to Zambia. It implies that matrimonial rules after 1999 can be applied to Zambia

notwithstanding the 1911 limitation. It is submitted that the intention of the legislature might manifest itself in the near future.

A qualification has been made with regard the application of English law to Zambia. All English law as a practice should be applied '*mutatis mutandis*' meaning with variations. This was acknowledged in the **Northern Rhodesia Order in Council 1924** in defining the jurisdiction of the High Court in **clause 27(2)**. It stated:

'(2) Such civil and criminal jurisdiction shall as far as circumstances admit, be exercised upon the principles of and conformity with the substance of the law for the time being in force in and for England.'

In the case of **Sosala Kayela V. Willem Jacobus Botes**¹⁸, the court observed that:

'the words as far as circumstances admit imply that in certain circumstances, English law cannot be applied by courts of this territory without modification.'

¹⁸ (1947) 3 N.R.L.R. 183

Perhaps in it's reasoning, the court was looking at the different social, cultural, political and economic circumstances, which exist between Zambia and England.

1.2.8. **THE BRITISH ACTS EXTENTION ACT**

Notwithstanding the **English law Extent of Application Act**, there was a realization that our legal system was still in need of other English statutes, which would play a key role in this jurisdiction. To this end, several selected British statutes after 1911 have been extended to Zambia by virtue of the **British Acts Extention Act**¹⁹. Only the Acts, which are enumerated in the said Act, are applicable to Zambia. This Act supplements the **English law Extent of Application Act** to help fill in the gaps in our laws. **Section 2** of the **British Extention Act** states:

'The Acts of the Parliament of the United Kingdom set forth in the Schedule shall be deemed to be of full force and effect within Zambia.'

The schedule referred to in the cited section lists the following British Acts as being applicable to Zambia:

¹⁹ Chapter 10 of the Laws of Zambia

- The Conveyancing Act 1911
- The Forgery Act 1913
- The Industrial and Provident Societies (Amendment) Act 1913
- The Larceny Act 1916
- The Bills of Exchange (Time of Noting) Act 1917
- The Married Women (Maintenance) Act 1920
- The Gaming Act 1922
- The Industrial and Provident Societies (Amendment) Act 1928
- The Limitation Act 1939
- The Law Reform (Enforcement of Contracts) Act 1954

1.2.9. **CONCLUSION**

The adoption and use of English law by our legal system both substantively and procedurally demonstrates the fact that our own laws are riddled with lacunas'. If the Zambian legal system was devoid of English law, it would lead to its demise. Compounded with the repugnant nature of customary law practices, which are subject to the

repugnancy rule, the delivery of justice would be a mythical reality in Zambia.

The next chapter is primarily concerned with the identification of lacunas' in Zambian laws, which are not covered by English law as extended to this jurisdiction and by our own local law.

CHAPTER TWO

2.1 Introduction

The presence of lacunas in the Zambian legal system cuts across both private and public law. In practice, public law can be distinguished from private law in that the latter concerns itself with grievances, which arise amongst individuals whilst the former concerns the public at large. In this jurisdiction, public law owes its existence from statute. Statute law in Zambia is bound in 26 volumes. From these enabling Acts of Parliament, lacunas are manifested. This chapter will identify some of the lacunas in public law but shall be biased towards criminal and constitutional law because it affects a significant section of the Zambian society. Procedural law in Zambia is also a segment where lacunas are apparent.

2.2 Public Law

2.2.1 Criminal law

The substantive criminal law of Zambia is found in the *Penal Code*, which is Chapter 87 of the laws of Zambia. Criminal law procedure is found in the *Criminal Procedure*

Code²⁰. Where there is no procedure in the Criminal Procedure Code, procedure is imported from Archbold Criminal Pleading and Practice. Lacunas in Zambian criminal law are numerous.

2.2.2 Incest

Incest is a sexual offence under Zambian law. It is defined by the Penal Code. *Section 159(1)* of the Penal Code states: 'Any male person who has carnal knowledge of a female person, who is to his knowledge his grand-daughter, daughter, sister or mother, is guilty of a felony and is liable to imprisonment for five years.'

This section implies that a male can have sex with his grand mother and this will not constitute a crime. An argument advanced regarding the intention of the legislator is that by the time a grand son reaches puberty, the grandmother would have reached meno-pause. The mischief the legislator wanted to cure was to prevent the transmission of weak congenital traits amongst family members. A potential threat, which would render this law nugatory, is what happens if a grand mother is impregnated by her

²⁰ Chapter 88 of the Laws of Zambia

grandson. The very purpose of incest being made a crime would fall away. It is submitted that a quality of a good law must cover every exigency. This lapse in our laws makes the law on incest inadequate.

2.2.3 Marital Rape

The *Penal Code* of Zambia is silent on the issue of marital rape. The *Penal Code* defines rape as:

'Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representation as to the nature of the act, or, in the case of a married woman by personating her husband is guilty of the felony termed rape.'²¹

The gap on marital rape in Zambian laws makes it difficult for women to refuse submission to abusive husbands who might put them at risk of contracting sexually transmitted diseases such as HIV/AIDS. A research-conducted by Women in Law in Southern Africa found that marital rape is a growing

²¹ Section 132, Chapter 88 of the Laws of Zambia

problem in Zambia. The study revealed cases where some women were forced to have sex two weeks after giving birth.²² This implies that women found this predicament have no legal recourse.

2.2.4 Torture

In Zambia, there is no crime called torture. On the international plane, various human rights legal instruments define what torture is and prohibit contracting parties from employing acts of torture. The most prominent multilateral instrument outlawing torture is the **Convention Against Torture**. Article 1 defines torture as:

'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a

²² *Marital Rape: What do Zambian Women Say*.2001. **Women's Legal News**, Lusaka; National Legal Aid Clinic for Women P.3

public official or other person acting in an official capacity.....'

Interesting to note, is that the Zambian government in 1999 ratified the **Convention Against torture**²³ but it has never attempted to domesticate any law against torture. Most acts of torture in Zambia stem from police brutality. It has been observed that successive governments in Zambia have used the police force to harass, wound, torture and kill citizens who are opposed to the government of the day²⁴. This gap in our laws is persistently used by the government of the day to repress political opponents.

2.3 CONSTITUTIONAL LAW

2.3.1 Mode of Adoption of the Constitution

The Zambian constitution provides no guidelines on the mode of adoption of the said constitution. For instance, in 1996 there were powerful arguments that the substance of the **Constitution of Zambia (Amendment) Act, 1996** was destructive of democratic principles, thus rendering the method of their adoption even more objectionable²⁵. The

²³ *Police Brutality in Southern Africa*. 2001. Lusaka; SAHRINGON P. 194

²⁴ *Ibid* P.193

²⁵ *Zambia Law Journal* Vol. 30. 1998. Lusaka; UNZA Press P. 25

preamble of the Zambian constitution portrays a fact that the people themselves enact the constitution. Past constitutional making processes have seen the constitution being enacted by the Zambian Parliament which itself is a creature of the very constitution. It has been argued that another body must enact the constitution rather than Parliament. The legality of that suggestion as law stands today might not be tenable because all legislative power in Zambia is vested in Parliament itself.

2.3.2. Usurping of Power by the Judiciary

The Zambian judiciary is premised on the separation of power even though not in the ideal sense as Montesquei deemed it. The constitution is silent on what should happen should the judiciary exercises either executive or legislative power. This is in relation to the Supreme Court because in inferior courts to the same, one has the right of appeal. Under the rules of the Supreme Court as subsisting in England, one can bring judicial review proceedings against an inferior court of law. **Order 53/14/25 of the Supreme Court Practice** states:

'Judicial review now lies against an inferior court or tribunal...'

However, judicial review does not lie against the Supreme Court. It is therefore follows that once the Supreme Court passes judgment, one cannot challenge the same unless it reviews its on decision in a later case.

2.3.3 Definition of State of Emergency

In every democratic society, it is always desirable to define the powers of the state in order to counter their acts with legal controls and ensure that the rule of law prevails. On this front, the Zambian constitution is silent on what kind of situation warrants the declaration of a state of emergency. The **European Convention on Human Rights and fundamental freedoms** refers to state of emergency as:

'war or other public emergency threatening the life of the nation.'²⁶

²⁶ Article 15

As can be seen, the European Convention on Human Rights and Fundamental Freedoms is specific on the meaning of a state of emergency unlike the Zambian constitution.

2.3.4 Nullification of Presidential Elections

Further, the Zambian constitution does not provide for what should happen should Presidential elections be nullified. For instance, this is in relation to all the appointments the ousted President may have made especially if the same President appointed some of the Supreme Court judges. It is also important to note that the Supreme Court is the court of first instance in an election petition of presidential elections.

2.3.5 Right to Information

In Part III of the Zambian constitution, which is the bill of rights, has a lacuna with regard to the right to information. The existence of this right is consistent and essential for any democratic country, which values an open society. Access to information is also key to having a well-informed public. A good example were the right to

information exists is the **South African constitution**. It states:

"Everyone has the right of access to-

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights."²⁷

Without this right, Zambia's democracy is far from developing as the free flow of information is curtailed and in most cases by the state. Further, freedom of the press is hindered because the same is restricted to publishing only certain kind of information. In addition, the press cannot as a matter of right demand to have access to information, which is only given at the discretion of the persons with the said information.

2.4 PROCEDURAL LAW

It is said that procedural law means the formal steps to be taken in an action or other judicial proceeding, civil or

²⁷ Section 32(1) of the South African Constitution

criminal.²⁸As already alluded to in chapter one, our legal system relies on reception statutes among other Acts to refer to English authorities both in procedural and substantive law where our laws are silent. The usefulness of English authorities is manifested by reliance on the *white book* in procedural civil matters and the *Archbold Criminal Pleading and Practice* where our Criminal Procedure Code is inadequate. This recourse has its advantages and disadvantages, which is the subject of Chapter 3.

2.5 CONCLUSION

Lacunae in the Zambian legal system are wide spread. They are as a result of many social, economical and political factors stemming from lack of adequate reform in our laws. Meaning would be added to the issue of lacunae in our legal system by looking at landmark decisions, which have exposed the adverse nature of the laws. The lacunae identified in this chapter are not exhaustive of the prevailing situation in our laws.

²⁸ *Osborne's Concise Law Dictionary*. 2001. Universal Law Publishing; New Delhi P.

CHAPTER THREE

3.1 Introduction

The manifestation of lacunas in Zambian laws is evidenced by precedent. In many instances, our courts have made bad law owing to a variety of external factors, which are accommodated in decisions through the existence lacunas. In the second republic, the court system was greatly tempered with owing to the one party system of government. The United National Independence Party's constitution was annexed to the Republican constitution, which in a way compromised to proper delivery of justice in our legal system. However, despite the winds of change, which led to the adoption of a new constitution in 1991 and the amendment of 1996, no profound changes have taken place to address the adverse effect of lacunas on the Zambian legal system. The most affected laws with regard to lacunas is public law. In view of this, most case law were the existence of lacunas have been manifested are usually high profile cases.

3.2 Case Studies

The Attorney General, The Movement for Multi-party Democracy V. Akashabamtwa Mbikusita Lewanika, Fabian Kasonde, John Mubanga Mulwila, Chilufya Chileshe Kapwepwe and Katongo Mulenga Maine²⁹

This was an appeal from the decision of the High Court (Mambilima J.) by the appellants against that portion of the judgment, which applied the literal interpretation to the provisions of Article 71(2)(c) of the 1991 Zambian Constitution inter-alia. The four Respondents were members of MMD. On 31st October, 1991 they stood for elections on the tickets of MMD. They won the elections and took their seats in the National Assembly. On the 12th of August, 1993 there was a press conference at Pamodzi Hotel at which all of the Respondents, except Katongo Mulenga Maine, attended and announced their resignation from the MMD. On 13th August 1993, the National Secretary for MMD wrote to the Speaker of the National Assembly informing him that the Respondents were no longer members of the party. On 27th August 1993, in consequence of that official notification by the National Secretary for the MMD, the Speaker wrote to the Respondents in terms of Article 71(2)(c) of the Constitution of Zambia they

²⁹SCZ Judgment No. 2 of 1994

ceased to be Members of parliament with effect from 13th August, 1993 a date when the National Secretary gave notification to the Speaker. The Respondents then petitioned the Attorney General contending that although they had resigned from the party on whose tickets they won the elections, they were still Members of Parliament and, asked the court to declare the Speaker's decision that their seats were vacant, null and void.

On the interpretation of Article 71(2) (c) the Supreme Court said that the said Article should read:

'A member of the National Assembly shall vacate his seat in the Assembly-

(b) in the case of an elected member, if he becomes a member of a political party other than the party, of which he was an authorised candidate when he was elected to the National Assembly or, having been an independent candidate, he joins a political party or vice versa.'

The implication of this decision is that the Supreme Court made law. In other words, the court usurped the powers of the legislature by making law. To be drawn from this case, is that notwithstanding this bad precedent set by the

highest court in the land, there is no law which allows one to challenge any act done by a superior court. This is a lacuna in our laws. The effect is that once the Supreme Court makes a decision no matter how absurd no one can question it because of the principle of *res judicata*.

Dean Namulia Mun'gomba V. The Attorney General³⁰

This case was significant in that it showed how the President can subjectively declare a state of emergency and no one can question him. The court went further to define what constituted a state of emergency.

The applicant was the President of Zambia Democratic Congress, an opposition party, was arrested and detained under emergency regulations following the abortive coup of 28th October 1997. He applied for a writ of habeas corpus ad subjiciendum. Mung'omba argued inter-alia, that the President had abused his powers to declare a state of emergency, as the facts on the ground did not justify the declaration. Judge Kabalata defined a state emergency as:

'where the situation is so grave that it is necessary for the President by statutory instrument to make regulations

³⁰ 1997/HP/2617(Unreported)

to provide for the detention of persons and for requiring persons to do work and render service. It is a situation in which the security of the nation and public safety are in danger. It is a situation characterized by disruption of public order, mutiny, rebellion and riot. The maintenance of supplies and services essential to the lives of the community are also endangered.'

The court held that it had no jurisdiction to enquire into the reasons for the declaration of state of emergency.

Like many others, this case showed that the presence of a lacuna in defining what constitutes a state of emergency gives lie way to any President to oppress his political opponents because he knows that no one can challenge his declaration.

Derrick Chitala (Secretary General of the Zambia Democratic Congress) V. The Attorney General³¹

This was a landmark case, which sought to challenge the mode of adoption of the Zambian constitution in 1996. It was an appeal against the decision of the High Court judge refusing to grant leave to bring judicial review

³¹ SCZ Judgment No. 14 of 1995

proceedings. The appellant sought inter-alia, an order of certiorari to have case moved into the High Court for the purpose of quashing the decision by the President and his cabinet to have the constitution of 1991(as revised in 1996) enacted by the present National Assembly; an order of mandamus directed and compelling the President and his Cabinet to take such measures as to ensure the Constitution is debated by and finally determined by a constituent assembly or any other broad based group and subjected to a referendum. In the High Court the learned judge refused to grant leave. The Supreme Court up held the lower court's decision.

An important lesson to be drawn from this case is that there exists no law in Zambia, which provides for the mode of adoption of the Zambian constitution. It has been argued that it is not legally sound for parliament to adopt the constitution because it is the creature of the very constitution. This would be likened to child giving birth to its own mother, which biologically is untenable. It is further submitted that proponents of the adoption through a constituent assembly put themselves in a legal quagmire because the constituent assembly is not a legal body. All

these arguments and uncertainties are as a result of lacunas in the law.

Godfrey Miyanda V. Mathew Chaila (Judge of the High Court)³²

In this case, the petitioner filed a civil suit on 10th September 1981. The hearing of the suit commenced before the respondent on 22nd August 1983. The hearing of the case was concluded on 7th September 1983 but judgment was not delivered until 18th October, 1984. Dissatisfied with the length of time which it took the judge to prepare and deliver judgment the applicant brought this action. He contended that by failing to deliver judgment within reasonable time the judge was in breach of Art. 20(9) the Constitution of Zambia. It was held that:

(i) A judge cannot be taken to court for delaying in adjudicating on the case;

(ii) The public have a right to have the independence of the judiciary preserved; the absolute freedom and independence of judges is imperative and necessary for the better administration of justice.

³² (1985)ZR 193

This case endorsed the fact that a judge has unfettered discretion in delivering judgment. It implies that in the event were a judge willfully delays judgment one has no remedy but to wait hence going against the principle of justice delayed is justice denied. There is a procedural lacuna with regard to time restriction in delivering judgment in superior courts of Zambia.

The Attorney-General V. Mofya³³

In Zambia, precedent shows that torture is not a crime but if proven, the remedy is by way of damages and the perpetrators never get imprisoned and in most cases these are public officials.

In this case, the Respondent claimed damages under heads of assault, intimidation, trespass and false imprisonment. Appellant appealed against trial courts award of: K800.000 for false imprisonment and trespass; K800 000 for assault and intimidation; and a further sum of K50 000 as punitive and exemplary damages.

It was held *inter-alia* that:

³³ (1995-1997) ZR 49 (SC)

No exemplary or punitive damages could be awarded because they were not pleaded, but damages for assault and torture should be awarded as pleaded.

This remedy lies in private law and not in criminal law hence proving that there is no crime called torture in Zambia.

The Attorney General V. Gilbert Mutale³⁴

Procedurally, the Zambian courts rely on procedure as it is obtaining in England were the same has not been provided for by our laws. It simply implies that if there is a lacuna in our laws but it is covered under English law, which is not extended to Zambia by either the English law Extent of Application Act or the British Extention Act, then one will have no recourse.

In the Gilbert Mutale case, the Attorney General had appealed against a decision of the High Court granting an application for a writ of habeas corpus. At the request of the Supreme Court, the question of jurisdiction was argued as a preliminary issue. It was held inter-alia that there being no legislation in Zambia corresponding to the English

³⁴ (1977) ZR 1

Administration of Justice Act, 1960; the court has no jurisdiction to hear this appeal.

This case illustrates a crucial point in that if an English statute is not extended to Zambia then there will be a lacuna in our laws because our own local legislation does not comprehensively cover the inadequacy.

3.3. CONCLUSION

In conclusion, the presence of lacunas in the Zambian legal system as evidenced by way of precedent cannot be exhausted. This chapter has highlighted selected landmark cases to show the extent of the bad effects of lacunas. In public law cases, most of the absurd and startling decisions have been made with regard to high profile political cases. This has been possible due to the veil of lacunas covering Zambian laws. The next chapter shall try to unearth a lasting solution to the problem of lacunas.

CHAPTER FOUR

4.1 Introduction

The task of placing mechanisms to ensure that the adverse effects of lacunas on the Zambian legal system are eradicated is not an easy one. There are various factors, which dictate the realization of a lasting solution with regard to the effect of lacunas. It is also important to acknowledge that the law is not static. According to Roscoe Pound, law must be stable, and yet it cannot stand still³⁵. In trying to find a lasting solution to the problem of lacunas, it would imply that the legislator should bear in mind the dynamism of the law. Other factors, which can be attributed to the issue of lacunas, include social, economic, political and cultural factors, which play a role in the enactment of laws in this jurisdiction. In most jurisdictions, there are institutions, which have been deliberately set up to address the issue of law reform. Among the said institutions are law reform agencies, parliamentary reform through enactment, repeal and amendment laws. Further, the role of judges in making precedent influence the legislators as judgments act as a measuring rod to the potency of certain laws. Regarding the application of English law in African jurisdictions,

³⁵ Zambia Law Journal 1971-1972 P.

development and modernization of the law seems to be a static realization. Among the many attributes advanced include poor financing of the Law Development Commission. In 1990, the budgetary allocation of the year 1990 was totally inadequate and did not correspond with the ever-increasing cost of various items required for the ever-rising costs of various items required for the recurrent expenditure of the Commission³⁸. Therefore, in light of this, it can be said that lack of funds contributes to the snail pace of conducting research, as the government will only release funds for areas in which they require research. It is submitted that proper scrutiny of our laws in order to curb the problem of lacunas will not be achieved as long as law reform is hampered by things like inadequate funding.

4.3 JUDGE MADE LAW AND PARLIAMENT

The role of the judiciary in any country is to interpret the law. This is achieved by judge made law that is to say precedent. A judicial precedent is a judgment or decision of a court of law cited as an authority for deciding a similar state of facts in the same manner, or on the same

³⁸ Report of the Law Development Commission. 1990. Lusaka; government Printers

principle or by analogy³⁹. Precedent plays an influential role in legislation. This was shown after the case of **Christine Mulundika and 7 Others V. The People**⁴⁰ where certain parts of the **Public Order Act** especially section 5(4) was declared null and void, as they were unconstitutional. Following this decision, the **Public Order Act** was amended at the instigation of government were by requirement of obtaining a permit before holding a public gathering was replaced with giving notice to the police.

In order to remedy the problem of lacunas, there should be either a law or an established practice that were a court of law has ruled that were a lacuna exists in a certain law, parliament should within a state time enact or amend law in order to remedy the ailment which is likely to be caused by the said lacuna. This predicament was illustrated in the case **The Attorney General V. Gilbert Mutale** already referred to in chapter 3. This inter-alia implies that there must be parliamentary reform, which should be consolidated by the enactment of legislation.

³⁹ Op.cit (Jowitt) P. 1385

⁴⁰ (1995-1997) ZR 21

4.4 LOCALISATION OF LEGISLATION

Another impediment to the adverse effects of lacunas is lack of our legislation. As already mentioned herein, most of legislation is imported. This has caused many hardships in addition to situations where lacunas are present. The law as it exists in England has caused hardships in our courts of law. An example was illustrated in the case of **J P. Karnezos v Hermes Safaris Limited**⁴¹, Justice Sakala, the current Chief Justice of Zambia observed that:

'Before leaving this case, I wish only to observe that the facts of this case are a clear example of the hardship that the doctrine of ultra vires may cause to unsuspecting third party dealing with a large company. It is in cases of this nature that I entirely agree with the suggestion of the Jenkins Committee (1949-1962) recommending the virtual abolition of the doctrine and protection to third parties who might have acted reasonably in the circumstances. I hope that any future changes to the Companies Act will take into account the hardships caused by the doctrine of ultra vires and make provisions to modify it.'

⁴¹ (1978) ZR 197 (HC)

Due to the fact that there is direct policy or law of addressing such situations, the doctrine of constructive notice continued until it was done with by the enactment of section 24, CAP 388 of the laws of Zambia in the revised 1995 laws. The application of English law *mutatis mutandis* leaves room for construing English authorities in a manner they were not intended. Parliament should understand the science of legislation. The science of legislation is concerned with predictions of the effects of proposed rules on the activity of role occupants (public officials or ordinary citizens) to whom it is addressed⁴². It therefore implies that parliament should inquire into the adverse effect of certain laws as result of lacunas among other things. In other words, parliament should not be passive of the effects of the laws, which they enact.

⁴² Zambia Law Journal (1971-1972) PP. 36-37

4.5 CONCLUSION

In conclusion, it is desirable that a permanent and lasting solution is found regarding the problem of lacunas. The solution lies in what the Zambian legal system can devise so as to ensure that lacunas are eradicated or at least reduced. Due to the presence of a dual legal system in Zambia, there is at times conflict between customary and English law. Further, where English statutes are not extended to this jurisdiction, there is a danger of creating lacunas in our laws. To counter this, it is of cardinal importance to localize some of the English statutes in order to ensure that our laws have adequate remedies. In addition, there must be a deliberate policy of enacting legislation where our courts have adjudged that there exists a lacuna.

CHAPTER FIVE

5.5 CONCLUSION

It is a conceivable fact that the colonial legacy left by the British is a contribution to the presence of lacucas in Zambian laws. The imposition of English law on Northern Rhodesia by the colonial power molded the legal system to be largely dependant on the practices and procedures of the English legal system. As colonial rule continued, there was need to recognize customary law as this was vital in maintenance of law and order in matters of native nature. In 1936 to 1960, native courts were created. Prior to this, under the B.S.A. Company, no native courts were established but in its royal charter of incorporation, the company recognized native laws. On the one hand, English Common law was extended to colonies by virtue of the *Foreign Jurisdiction Acts*. However, later on the High Court Ordinance in **Section 11** extended Common law, doctrines of equity and the statutes, which were in force in England on the 17th August 1911. This is today replicated in the English law Extent of Application Act. The time limit of 1911 and the Acts specifically enumerated in the British Acts Extention Act are not adequate or as an end to

eradicating lacunas because they are still existent in our laws.

Further to this, Zambia adopted colonial legislation at post independence with little or no modification whatsoever. Most of this legislation is not suited for a democratic country. For instance, some provisions in the **Penal Code**. Another example is the **Public Order Act** whose objectives is still to prohibit the wearing of uniforms by militant groups inter-alia. It is out of tune with the demands of a democratic society.

The presence of lacunas is wide spread in our laws. In almost all the laws, there are lacunas. This has been evidenced by precedent and in most instances; the aggrieved individual has been left without a remedy. In political cases, the volume of decisions has shown that the government gets away with several wrongs. For instance, torture is not crime in Zambia. It has gone unpunished. In addition, most laws are incomprehensive to cover most exigencies. Despite the fact that Zambia is a signatory to most international legal instruments, it has not domesticated the salient provisions under the said instruments.

To compound the adverse effect of lacunas even further, the existing institutions are not equipped with the necessary policies, legislation and political will. Other factors such as inadequate funding hamper their work. For instance, the Law Development Commission is poorly funded which among other issues hinders its work. Apart from this, the control exerted by the Minister of Legal Affairs directory or indirectly in initiating which areas to research in is undesirable. Further, the revision of Zambian laws takes a very long time. The last revision was done in 1995, which emanated in the green volumes of statutes. The legislative arm of government that is to say Parliament is dorsile in amending certain laws. Perhaps its because the ruling party is in majority and the law as it is favours them. The impact of precedent as an indicator of lacunas is not highly appreciated as judge-made law helps in pointing out areas of the law, which need reform.

In light of the aforementioned, it is recommended that there should be a comprehensive reform law with respect to lacunas not only mere amendments. Further, the Law Development Commission should be adequately funded. In addition, political control should be delinked from the Commission. There should also be legislation compelling

parliament to review the law where lacunas have been unearthed in cases before the courts of law. Legislation should also be localized in areas where conflict is likely to arise due to the presence of a dual legal system. In the cases of ***Chimpampwe V. Registrar of Lands***⁴³ and the case of *Ex-parte Njobvu*⁴⁴, the High Court passed two different decisions contradicting itself on points of law. These cases related to the application of customary law to state land. The question was whether a local court order of appointment does vest a deceased's leasehold (and presumably, freehold) property in his administrator. Such conflicts in our dual legal system will continue until a common and permanent solution is found.

This research paper acknowledges the fact that the lacunas, which have been brought to light, do not cover all lacunas existing in our laws. It is therefore open to future research to unearth the one not brought to light so as to ensure the smooth delivery of justice in the Zambian legal system.

⁴³ (unreported-HN, 1039/1971)

⁴⁴ (unreported-HP.1096/1971)

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