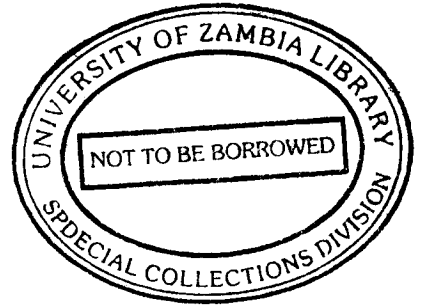


# THE UNIVERSITY OF ZAMBIA

## SCHOOL OF LAW

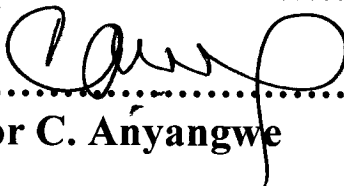


I recommend that the directed research essay prepared under my supervision by **GIBSON BANDA**, entitled;

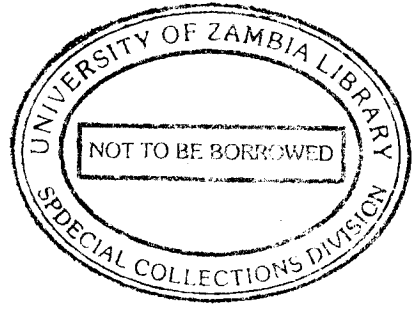
### A CRITIC ON THE ADEQUACY OF THE ZAMBIAN BILL OF RIGHTS IN THE PROTECTION OF FUNDAMENTAL RIGHTS.

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements relating to format as laid down in the regulations governing Directed Research essays.

Date.....24/1/07.....

Supervisor..........  
Professor C. Anyangwe

## **DEDICATION**



To my late mother, MRS. BESSY. PHIRI BANDA, mum, you may be gone, but your spirit will remain forever alive in me. Thank you for the seed you sowed in me, though you may not be around to enjoy its fruits, I know you are looking down at me very proud of the work you invested in me.

May your soul rest in God's eternal peace

To my Father MR. BERNARD. B.C. BANDA, I remain forever indebted to you for always believing in my abilities and encouraging me to always aspire high.

To my young brothers and sisters: Simon, Tamara, Tapiwa, Martin and Martha, you are a source of my aspiration. I love you so much.

To my grandmother, LACKNESS SAKALA, You have always been a mother and grandmother to me and my young ones and it is because of your able guidance that I have managed to come this far. Thank you.

Over and above, I give thanks to our Heavenly Father who knew and set as apart even before we were conceived in our mother's womb. Praise be to his name now and forevermore. Amen.

## **ACKNOWLEDGEMENTS**

Special thanks go to my Supervisor Professor Carlson Anyangwe, for guiding me through out the completion of this work and for being patient with me

These thanks are further extended to the Late Professor Alfred. W. Chanda, Dean of the University of Zambia, School of Law, whose works provided the foundation for this research essay. Rest in Peace Professor Chanda, your works will always continue to inspire us.

Lastly, but not the least, I thank all who may not have been mentioned but have helped in one way or another in the completion of this work.

I remain grateful to you.

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# CHAPTER ONE: HISTORICAL BACKGROUND OF THE ZAMBIAN BILL OF RIGHTS

## INTRODUCTION

Human or fundamental rights can be said to have existed in early days under the name of natural rights and these can be said to be moral rights which every human being is entitled to have or enjoy irrespective of his\her status in life. In other words, these are rights one has as a result of being human. These rights serve a number of purposes and among them are: they protect human dignity, they are essential for individual well being and fulfillment and thirdly, they are necessary for the preservation of peace and justice. Hence, it goes without saying that no man can be deprived of these rights without a grave affront to justice.

The tradition conception of fundamental rights and freedoms has been that of rights which:

*“...are designed to define the relation of the individual to the state”<sup>1</sup>*

From this it is clear that these rights have not normally been conceived as binding on the private individual but rather they have been widely acknowledged as being exclusively concerned with checking the exercise of government powers vis a vis the citizen. This conception of human right as aptly summarized by Professor Laterpacht is:

*“...a denial of the absoluteness of the state..., an assertion of the value and of the freedom of the individual as against the state; and the instance that there are limits to the power of the state to interfere with mans rights”<sup>2</sup>*

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<sup>1</sup>A. W Chanda, Zambia: A Case Study in Human Rights in Commonwealth Africa.

It therefore suffices that even before the evolution of modern constitutions; human rights (or natural rights as they were then called) were regarded as limits on the state or sovereign exercise of power. An example can thus be drawn from the early Greeks, viewed these rights as solely concerned with imposing limitations on the power of the state. As was commented on by Professor Alfred Chanda that they:

*“...draw a distinction between ‘higher norms’ of the divine power and the commands of the state”<sup>3</sup>*

This perception of natural rights as limitations on the sovereign or state powers survived through the Romans times into the Middle Ages and had a great influence on people like John Locke and Jean Jacques Rousseau who were proponents of the famous social contract theory. According to this theory society is based on the principle that the power of the ruler is limited. This theory in turn was of considerable influence on the American and French Revolutions. It is notable that both the American and French Revolutions were prompted by the desire to assert the natural rights of the individual and the sovereign. It was consequently, because of this great desire to safeguard the rights of individuals as against the sovereign or state that modern constitutions incorporate Bill of Rights in their constitutions. A Bill of Rights can be said to be a list of fundamental rights guaranteed by the constitution.

#### (a) **The International Bill of Rights**

This conception of rights as limitations on the powers of the sovereign culminated in the International protection of these rights. Consequently, some scholars have divided the

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<sup>2</sup> Professor Laterpacht An International Bill of Rights of Man (1948) Pg

<sup>3</sup>Professor A. W Chanda : A Case Study in Human Rights, Commonwealth Africa. Thesis Submitted to Yale University (1992) Pg



phases in the development of human or natural rights into two parts: first is the period before the Second World War and secondly is the period after the end of the Second World War. In the case before the Second World War, the international protection of human rights manifested itself by way of protection of the rights of the minorities of states formed pursuant to the peace treaty of Versailles. As regards this scheme which was introduced by the covenant of the League of Nations:

*“...the states undertook to grant to all their inhabitants full and complete protection of life and liberty and recognized that they were entitled to the free exercise of any creed, religion or belief...”<sup>4</sup>*

This scheme was however unsuccessful as it collapsed together with the League of Nations as a consequence of the Leagues failure to command the confidence of some major powers. It was however, after the end of the Second World War that an opportunity to put in place a comprehensive scheme for the regulation of human rights at international level presented itself. This move was aimed at preventing a repeat of the horrors which had perpetrated the Second World War. These atrocities were widely viewed as:

*“...a result of the practice ... (Fascist regime)... depriving the individual of both his civil and political rights”<sup>5</sup>*

Therefore, as a quest for peace in the world, it was agreed that the first step for attaining peace was to make it mandatory for all states to respect civil rights of its citizens. Thus, with the formation of the United Nations, the United Nations Charter laid down a foundation for the international protection of human rights. The provisions of the Charter

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<sup>4</sup> Ezejiolor, Protection of Human Rights under the Law (1964) Pg 41

<sup>5</sup> Professor C. Anyangwe Introduction to Human Rights and International Law (2004) Pg 31

laid down for the protection of human rights are notably made in very general language and it was not until the passing of the Universal Declaration of human rights in 1948 that these rights were defined in precise terms.

This declaration together with four other core documents is collectively referred to as the 'International Bill of Rights.' The international Bill of Rights has greatly influenced a number of international and inter regional documents and foremost of these being the European Convention on Human and Peoples Rights and also the African Charter. In the same vein the importance of an International Bill of Rights as observed by Professor Carlson Anyangwe is that it:

*"...sets the global standard with which each state's domestic laws and practices should conform and against which their conformity can be assessed..."<sup>6</sup>*

#### **(b) The Zambian Bill of Rights**

Not until the self governing constitution of 1963 did Zambia (Northern Rhodesia as it was then called) have a Bill of Rights in its Constitution. The basic reason for this was because the viability of colonialism was dependant upon the suppression of natives and their denial of fundamental rights. However, it can be noted that there were a number of provisions under the Federal constitution through which certain fundamental rights of the citizens primarily natives, were to be protected and an example of this provision was in Article 70 which provided for the establishment of a standing committee in the Federal Assembly called the African Affairs Body, which was created for the purpose of checking the passing of legislation which might be considered unfairly discriminatory

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<sup>6</sup> Ibid Pg 31

against the natives. In addition to this provision Article 99 of the Federal constitution empowered the United Kingdom government to reserve and disallow any legislation which it considered objectionable. All these safeguards were intended for the protection of the rights of the natives.

Apart from the provisions of the Federal Constitution as mentioned above the liberties of the subjects had been governed by ordinary law as it was in England. However, it is clear that there existed differences between cases involving fundamental human rights in England and those in the colonies or protectorates. This position which included Zambia{Northern Rhodesia} raised the question as to whether citizens of the colonies were secure in the enjoyment of human rights and fundamental freedoms without discrimination as to sex, language or religion. An example of this can be seen in the case of *R V BURNS AND OTHERS*<sup>7</sup>.

In this case Mr. Burns had denounced the House of Commons as *“composed of capitalists who had fattened upon the labor of the working men... to hang these would be a waste of good rope and no good to the people was to be expected from these representatives, there must be a revolution to alter the present state of things.”* Although these words were regarded as *‘highly inflammatory’* by the jury, Burns was never the less acquitted of the charge.

In another English case of *R V CAUNT*<sup>8</sup>: a Provincial newspaper published a lead article attacking a British Jury in virulent terms. The article concluded with a suggestion that violence might be the only way of bringing British Jury to its senses. The defendant editor was found of not having an intention to incite violence and was acquitted.

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<sup>7</sup> (1886) X11 TLR 510

<sup>8</sup> The Times, 18 November 1947

However, in *R V WALLACE-JOHNSON*<sup>9</sup>; the accused was charged with publishing a seditious article concerning the government of the Gold Coast {Ghana} contrary to sections of the Criminal Code. The trial took place before the Chief Justice of the colony sitting with three assessors. The accused was found guilty of the charge even though the article complained of did not in any way mention the use of violence as in the above English cases; there was no evidence or manifestation of hostility by the natives to the government of the colony as a result of the article. It should be mentioned that the provision of the Criminal Code which the accused was charged was substantially the same as the English law of sedition and even though Wallace-Johnson's appeal against conviction was upheld by the West African Court of Appeal and the Judicial Committee of the Privy Council, there was a clear limitation on the freedom of speech in the colonies as compared with the United Kingdom and as already mentioned earlier, this position can be said to have extended to Zambia {Northern Rhodesia}.

#### **(ii) The 1963 "Self Governing" Constitution**

Events leading to the incorporation of a Bill of Rights in the 1963 Constitution began with the announcement in the House of Commons by the British Prime Minister of the appointment of an advisory commission:

*"...to advise the five governments in preparation for the 1960 Review on the constitution and the framework best suited to the advancement of the objectives contained in the Federal Constitution including the preamble"*<sup>10</sup>

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<sup>9</sup> (1940) AC 231

<sup>10</sup> Muna Ndulo and Robert Kent "The Constitutions of Zambia" Zambia Law Journal VOL 30 1998 Pg 5

The Commission appointed commonly referred to as the MONCKTON COMMISSION recommended the introduction of a Bill of Rights in the Federal Constitution. Thus, it reported:

*“We have come to the conclusion that in the interest of the greater security, a Bill of Rights ought to be included in the constitution of the Federation...”<sup>11</sup>*

The commission further recommended that such a Bill of Rights should be drawn:

*“...in accordance with the traditions of the English speaking world and the current practice in the multi-racial commonwealth”<sup>12</sup>*

It was, however, not until 1963 that the recommendations of the Monckton Commission were implemented through the introduction of the Bill of Rights in the self governing constitution. This Bill of Rights was modeled on the Nigerian Constitution of 1963 which in turn was based on the European Convention for the Protection of Human and People’s Rights. This convention, like all other treaties and conventions created under the auspices of the United Nations Charter were essentially aimed at ensuring that signatories to it safeguard the fundamental rights and freedoms of their citizens and in this way help to prevent the possibility of a recurrence of the human rights atrocities perpetrated by the fascist states against their citizens and those of other countries during the second world war. It is therefore true that the tradition of using human rights essentially as safeguards against state powers would pervade all jurisdictions whose Bill of Rights have been modeled on the convention (European Convention on Human and People’s Rights).

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<sup>11</sup> Monckton Commission Report

<sup>12</sup> Ibid

### **(iii)The Independence Constitution of 1964**

Following negotiations held in London in May 1964 the final order in council was passed and it was accompanied by an Act of Independence by the British Parliament. The final order in councils second schedule (II) set forth the constitution of Zambia. Like the 1963 “self governing” constitution, the Independence constitution also contained an extensive Bill of Rights. Under it every person in Zambia regardless of race, place of origin, political opinion, color, creed or sex was entitled to fundamental rights and freedom. The rights enumerated in the constitution were: life, liberty, and security of the person and the protection of the law, freedom of conscience, expression, assembly and association, freedom of the privacy of the home and other property and freedom from deprivation of property without compensation.

*“The rights, however, were by no means absolute. They were subject to detailed limitations, popularly refereed to as ‘Savings Provisions’ contained in the very section granting the individual rights”<sup>13</sup>*

The 1964 constitution contained stricter procedures to be followed for alteration of the bill of rights than for the enactment of ordinary legislation and this is illustrated by article 72 (3) (a) (b) (c) which provided that ‘

*“...in so far as it altered any part of the constitution relating to fundamental rights, such a Bill could not come into force until submitted to a national referendum and approved thereby”<sup>14</sup>*

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<sup>13</sup> Ibid 10 Pg 5

<sup>14</sup> 1964 Constitution Article 72 (3) (a) (b) (c)

The whole intention behind this entrenchment article was to make it difficult to alter provisions of the constitution relating to the protection of rights of individuals. However, this provision was a target for repeal early in the life of the constitution and its elimination came in 1969 through an amendment and referendum billed as the '*referendum to end all referenda*.' Thus, constitutional (amendment) (number 3) Act of 1969 amended the constitution and the effect of this amendment was that it would no longer be necessary to submit to a referendum any Act of Parliament for the alteration of Part III of the constitution which contained the Bill of Rights and also part seven (VII) and Articles 71 (2), 72, 73 of the constitution. The aim of this amendment was for the facilitation of amendments to the rights to property which was a right protected under the Bill of Rights. However, its implications were far broader as a removal of the referendum clause was later to facilitate the adoption of the one party system of government. Thus the government through the amendment avoided the need for a referendum and left the entire constitution subject to amendment if those in control composed a two-thirds majority in parliament. It thus, suffices that through this amendment, fundamental rights of the subjects were entirely left to parliament for determination provided a two-thirds majority in support of a proposed Act of parliament was attained. This was later to have far reaching effects on the protection of human rights in Zambia.

(iv) **The 1973 Constitution**

Under the pretext of national unity and economic development:

*“In 1972, the government announced that it had decided to turn Zambia into a one party state”<sup>15</sup>*

It has however been argued that in reality the main reason behind this decision was in response to mounting divisions in the ruling United National Independence Party (UNIP). Thus, to facilitate the process, government appointed a constitutional committee to recommend the form and detail of the single party system and it was chaired by Vice President Mainza Chona. This commission made sweeping recommendations in the area of human rights and a good illustration was a recommendation to curtail the powers of detention which had constantly been used by government to deal with mostly political opponent viewed as a threat to UNIP's rule. Government's reactions to the recommendations of the Chona commission can be said to have been mixed as it rejected some of the recommendations like the one for the curtailment of the presidential powers of detention.

The second republic came into being on 25<sup>th</sup> August 1973 with a one party constitution being enacted by the National Assembly and being assented to by the President. It should be mentioned here that this enactment which was to have effect on the fundamental right like the freedom of association and political opinion could not be referred to a referendum due to the effect of the constitutional amendment number (3) of 1969 which gave parliament the power of amending any part of the constitution without the need of submitting it to a referendum. Under this new constitution there was only to be one political party which was UNIP. Thus, while the 1973 constitution contained a Bill of Rights just like its predecessor, guaranteeing those fundamental personal interests set forth in the preamble:

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<sup>15</sup> John. M. Mwanakatwe The End of the Kaunda Era (1994) Pg 88



*'These rights, however, were rendered practically meaningless in the context of a one party state with sweeping executive powers'<sup>16</sup>*

Consequently, freedoms of speech, assembly, association and political opinion could only be exercised within the United National Independence Party (UNIP) and the president's powers of detention without trial continued in certain situations.

#### **(v)The 1991 Constitution**

Following increased pressure on government by the trade union movement, the business community, the churches, university students and the legal profession, government was forced to amend the constitution so as to permit formation of other political parties and it further announced to undertake comprehensive amendments of the constitution. Another factor that contributed for government to abandon its one party system was due to the collapse of socialism in Russia and Eastern Europe. This factor inspired the advocates for change in Zambia and this fight was led by the Movement for Multiparty Democracy (MMD). Moreover owing to the collapse of the economy and lack of democracy, the government lost legitimacy and in 1990, the constitution was amended in order to allow the formation of other political parties.

Government appointed a constitutional commission chaired by M.P. MVUNGA, then Solicitor General. Some of the commission's recommendations were rejected by the government. However, the 1991 constitution was agreed upon by all political parties following interventions by the students at the University of Zambia and the church and was enacted by Parliament on the 2<sup>nd</sup> August 1991 and approved by the President on 29<sup>th</sup> August 1991. This constitution like its predecessor, provided for the protection of

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<sup>16</sup> Muna Ndulo and Robert. B. Kent 'The Constitutions of Zambia' ZLJ VOL 30 1998 Pg 14

fundamental rights and freedoms of the individual through the Bill of Rights. This Bill of Rights was basically a reproduction of the one contained in the previous constitutions, except that it had a few additions to it like the rights of children which were notably absent in the previous constitutions.

Under the 1991 constitution, the entrenchment clause of the bill of rights present in the 1963 and 1964 constitutions, but absent in the 1973 constitution was retained in the 1991 constitution. Hence, because of this clause, Parliament could not touch any part of the bill of rights as was the case with the 1973 constitution as any amendments to it had to be referred to a referendum and could no longer be passed by a mere two thirds majority in Parliament.

#### **(V) The 1996 Constitution**

Upon the abolishment of the one party system of government, one of the promises made by the Movement for multiparty Democracy (MMD) was that upon being elected into power, it would embark on the enactment of a new Constitution which was to go above partisan lines. Consequently, in 1993 government appointed a Constitution Review Commission Chaired by John Mwanakatwe which was given terms of reference far wider than those accorded to any previous Constitution Commission. It was directed to recommend a system that will:

*“Ensure that Zambia is governed in a manner that will promote the democratic Principles of regular and fair elections, transparency and accountability... appropriate arrangement for the entrenchment and protection of Human Rights, the rule of law and good governance”<sup>17</sup>*

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<sup>17</sup>Statutory Instrument Number 151 of 1993, Term of Reference (9)

In the field of fundamental rights, the commission recommended strengthening some rights and adding others and most notable are a drastic increase in the protection of women's rights and the prohibition of laws, customary practices and stereotypes which worked against the dignity of women. However, the government rejected most of the progressive recommendations of the Mwanakatwe report. An example of this was government's rejection of calls for a broad based constitution assembly to ratify the proposed constitutional changes, rather the government determined to amend the 1991 Constitution by an Act of Parliament did not touch the bill of rights as doing so would have required a referendum as the bill of rights was entrenched in the constitution, and since a referendum was something government was determined to avoid, the bill of rights was left as intact as it was in the 1991 Constitution . Thus, every part of the 1991 Constitution was repealed and replaced except for part three which governs the protection of fundamental rights and freedoms of the individual.

Debates on a constitution that can be viewed as adequate for the people of Zambia have continued and it is from here that a Constitution Review Commission headed by Mr. Willa Mung'omba was put in place and it received submissions from the public and it has since made it's recommendations through a draft constitution which has notably enlarged the number of protected fundamental rights and freedoms under the Bill of Rights. However, these recommendations are yet to be reacted to by the government.

### **Conclusion**

Since the first appearance of the Bill of Rights in the 1963 self governing constitution: constitutions of the country have changed: first there was the independence constitution of 1964, then the 1973, 1991 and then the 1996 constitution. In addition to these

Constitutional changes, the country has undergone changes in the systems of government: there was a multiparty system of government at independence, then the introduction of a one party system in 1973 before reverting back to multipartism in 1991. In spite of these changes that the country has undergone, it can be concluded that the Bill of Rights has remained the same from the first time it was included in the 1963 self governing constitution to date.

## **CHAPTER TWO: NARROW SCOPE OF THE ZAMBIAN BILL OF RIGHTS: ABSENCE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS.**

### **INTRODUCTION**

Human rights are of course those rights which are inherent in our nature as individual human beings and without which we cannot live as humans. They are rights which are innate in us individually and which inhere in us, inalienable by virtue of our humanity, and the dignity and integrity to which that humanity entitles us. As has been observed in the earlier chapter, the importance of protecting these rights has for some time been recognized in the Zambian legal system and this can be observed from the introduction of the bill of rights in the “self governing” constitution of 1963. However, even though the bill of rights has been present in our constitution since 1963, it has been observed that it is inadequate in its protection of fundamental rights and it is for this reason that this chapter will focus on the first observed weakness and that is the fact that it has a narrow scope of the rights it endeavors to protect. In order for us to critically look at this weakness, this paper will first of all endeavor to briefly look at how these rights have been categorized into “generations” by some scholars before coming down to the fact that some of these “generations” of rights are notably inadequately provided for or in some instances completely absent in the bill of rights. In spite, of the fact that Zambia has in the past signed and ratified some of the international instruments that contain these rights she has, however, failed to make them a part of the domestic law.

### **(a) Categorization of Human Rights into Generations**

In 1948, the United Nations Declaration of Human Rights established general principles or standards of human rights, while the covenants laid specific definitions of rights and limitations or restrictions on their use. In addition, the covenants endeavored to set out the obligations which were to be assumed by states which had ratified or acceded to them and in the event that any member state broke any of the provisions of the covenants, then that state would in effect be in clear violation of international law.

*“Upon ratification of a covenant, each state party promises to adopt such legislative or other measures as may be necessary to provide an effective remedy if these are violated”<sup>18</sup>*

Human Rights have been classified into categories or “generations” by some scholars. In criticizing this classification of human rights Professor Anyangwe observes that this classification:

*“... Is controversial and unsatisfactory in more ways than one. The terminology used in this area is confusing and debatable. The classification itself is ideologically driven and therefore controversial. Thus, the compartmentalization of rights is of doubtful wisdom and utility”<sup>19</sup>*

However, this distinction of human rights: 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, generations, has only a theoretical interest and the human rights themselves do not make such a subcategorisation and they

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<sup>18</sup> Anyangwe. C. “Human Rights: Geraraliation, Holism and Relativity” Zambia Law Journal 1993-96 VOL 25 -26 Pg85

<sup>19</sup> Ibid 85

say nothing about their own ranking in any hierarchical order as they do not state which one of them will prevail in case of any conflict in their respective provisions.

### **First Generation Rights**

This generation or category of human rights is said to comprise of Civil and Political rights as they are set out in articles 2 to 21 of the Universal Declaration of Human Rights and were latter given their binding effect in the International Covenant on Civil and Political Rights (ICCPR) of 1966. These civil and political are said to be devised in a way that will ensure freedom from any curtailment of individual liberty. They are consequently fictitiously labeled “negative rights” as they are believed to be those rights whose exercise does not to require any intervention from the state as they adopt a “laissez-faire” or “hands off” policy. However, Professor Anyangwe has criticized this position by stating that this:

*“hands free policy does not exist in today’s world as there can be no sphere of human conduct, not even private morality in which the state has or can properly adopt a ‘hands off’ policy and that even those called laissez-faire economic policy or free market economy is a type of regulated economy”<sup>20</sup>*

Some of the rights that fall under this category are: freedom of association, assembly and expression, freedom from slavery and forced labor, protection of the law, right to life, privacy to person and property

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<sup>20</sup> Ibid Pg 85

## **Second Generation Rights**

These rights basically comprise of the economic, social and cultural rights found in articles 22 to 27 of the Universal Declaration of Human Rights and were given binding legal character in the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR). Among the rights falling under this category of rights include rights to: social security, fair and safe conditions for workers, adequate standards of living for every one and this involves adequate clothing, housing, food, safe drinking water and sanitation, access to education. It has been forwarded that the main purposes of these rights are to ensure social justice, freedom from want and participation in the social, economic and cultural aspects of life. It is for this reason that some academicians have labeled these rights as “Positive Rights” due to the fact that these rights unlike the civil and political rights, demand an active role to be played by the state for their realization. However, the differentiation between ‘positive and negative’ rights has been said to be unhelpful:

*“..Because all human rights entail both negative duties of abstention and a positive duty of assistance”<sup>21</sup>*

## **Third Generation Rights**

This category of human rights is the most recent and these can be linked to the idea of solidarity or universal brotherhood and these are embryonically indicated in article 28 of the Universal Declaration of Human Rights. These rights are said to include the right to self determination, the right to ethnic group or of a people to a physical existence, the

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<sup>21</sup> H.SHUE. BASIC RIGHTS: SUBSTANCE AFFLUENCE AND UNITED STATES FOREIGN POLICY (1977) Pg 51



right of certain minorities to maintain their own identity and the right to peace and healthy environment. Ideologically, this category of rights can trace its origin in the communist underdeveloped south,

## **(2) INADEQUENCIES OF THE ZAMBIAN BILL OF RIGHTS**

Having looked at the 3 categories or generations of human rights, it becomes evident that one major deficiency with our bill of rights lays in the fact that it has a narrow scope of the rights that it endeavors to protect. It is for this reason that several Civil Society Organizations (CSOs), the general public and faith based organizations have challenged the inadequacies in the constitution with regard to the protection of economic, social and cultural rights. A few examples that can illustrate this point are: In November 2003, the Zambia Episcopal Conference (ZEC) noted in their Pastoral letter on constitution reform “Let My People Go”<sup>22</sup> that for our nation to meet the challenges of globalization, social and economic transition, there is need to provide a clear set of guidelines on economic, social and cultural rights in the bill of rights.

Likewise, the OASIS Forum’s<sup>23</sup> submissions to the Mung’omba CRC in September 2004 recommended that the economic, social and cultural should be incorporated in the bill of rights. It also noted that women should have a right to equal treatment and opportunity to participate in the political, economic, social and cultural life of the nation.

Furthermore, the Women in Law in Development in Africa (WILDAF) 2004, writing on ‘Minimum Standards Relating to Women and Children’s Rights’<sup>24</sup> observes a similar fashion that the current constitutions does not recognize social and economic

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<sup>22</sup> Zambia Episcopal Conference(ZEC) “Let My People Go” November 2003

<sup>23</sup> OASIS FORUM submissions to the Mung’omba Constitution Review Commission September 2004

<sup>24</sup> WILDAF(2004) draft report” Minimum Standards Relation to Women and Children’s Rights

rights. WILDAF sees the exclusion of economic, social and cultural rights from the bill of rights to be an anomaly because rights are interconnected and indivisible and their inclusion would enable most women to gain access to economic independence. Similarly, the Permanent Human Rights Commission,<sup>25</sup> in its submission to the Mung'omba CRC highlighted the real need to strengthen the scope of fundamental rights and freedoms to include social and economic rights that have not been explicitly guaranteed by the constitution.

The above position has also been championed by the umbrella group of women's organizations in Zambia, the Non-Governmental Organizations Committee (NGOCC), in their wider campaign to educate the general public in both urban and rural areas on the importance of economic, social and cultural rights in the fight against poverty. Members of the NGOCC express their belief that enshrining in Zambia's bill of rights the economic, social and cultural rights to education, health and employment will contribute to the development of the nation and is crucial to fighting poverty. For these women's organizations, education for all is both a human right and a development necessity, for this ensures the elimination of gender disparities in primary and secondary education. Therefore, they demand the inclusion of economic, social and cultural rights within the bill of rights.

It suffices from the above observations that:

*“The public, through Civil Service groups and the church, recognize that economic, social and cultural rights are currently not legally enshrined in the constitution and their protection has not been the priority of government. Therefore, people need to continue to advocate for the implementation and protection of the*

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<sup>25</sup> Permanent Human Rights Commission Submission to the Mung'omba CRC

*economic, social and cultural rights in the bill of rights especially at the time of constitution review”*<sup>26</sup>

What can be observed from the above position of the general public, civil societies and the church is that the major deficiency with our bill of rights is the absence of economic, social and cultural rights. In addition, this inadequacy has not escaped the eye of the international community and an example of this is; Conclusions and Recommendations on Zambia of the United Nations Committee on Economic, Social and Cultural Rights at its 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> meetings held on 26<sup>th</sup> and 27<sup>th</sup> April 2005 in its recommendation number thirty (33) suggested that:

*“Reaffirming the principle of the interdependence and indivisibility of all human rights and that all economic, social and cultural rights are justiciable, the committee strongly recommends that the state party incorporates the International Convention on Economic, Social and Cultural Rights in its domestic laws...”*<sup>27</sup>

A number of concerns have been advanced about the inclusion of economic, social and cultural rights in the bill of rights of the constitution and the first concern was advanced in 1996 by the Mwanakatwe Constitution Review Commission when it recommended the broadening of the scope of the bill of rights in order to consolidate democracy and secure liberties. However, rights such as the right to culture, women’s and children’s rights which would favour the achievement of economic, social and cultural rights were rejected by the former government of President Chiluba in the government’s response to the Mwanakatwe recommendations.

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<sup>26</sup> Non Governmental Coordinating Committee 2002 Report

<sup>27</sup> Recommendation Number 33 of the UN Committee on Economic, Social and Cultural Rights in Zambia. UN. DOC. E/C. 12/1/ Add.106(2005)

Secondly a general observation has been made that the:

*“... Current levels of illiteracy, poor working conditions, unemployment levels, the bad conditions of housing, medical care and sanitation and the escalating levels of poverty provide sufficient evidence that there is a prima facie violation of human rights”<sup>28</sup>*

It consequently suffices from here that a good number of advocates of economic, social and cultural rights believe that the absence of these rights in the Zambian bill of rights has contributed to the poor living conditions of most Zambians simply because the government is not obliged by law to provide for an adequate standard of living for its citizens.

Furthermore, in its “***Communiqué on Natural Consensus on Women and Children’s Rights***” of August 2004, The Women in Law and Development in Africa(WILDAF) and the Women in Law in Southern Africa(WILSA) maintained in this document that the lack of guarantee of access to economic, social and cultural rights has worked against women’s development as research conducted by the Zambia Law Development Committee and WILSA on the Zambian laws relating to inheritance, maintenance, family and gender violence fall short of the minimum standards of justice and create an obstacle to the realization of economic, social and cultural rights. In illustrating the shortfall of the Zambian laws in meeting the minimum standards of justice at regional and international levels, the United Nations Committee on Economic, Social and Cultural Rights, in its

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<sup>28</sup> JCTR Report “Zambia’s Economic, Social and Cultural Rights: why should they be in the new Constitution”

Conclusions and Recommendations on Zambia number fifteen (15), the following was said:

*“The Committee is concerned that article 23(4) of the current constitution of the state (Zambia) provides for exclusions and exceptions to the prohibition against discrimination, including in the respect to adoption, marriage, death and other matters of law and to the application of customary law”<sup>29</sup>*

The above observation by the Committee was made bearing in mind the fact that most of the discrimination against women for example fall under customary law, hence, the exclusions and exception in Article 23(4) of the Zambian Constitution is of no help to women in their realization of economic, social and cultural rights and it was for this reason that in Recommendation number thirty-eight (38), the committee

*“...recommended that the state party (Zambia) facilitates the constitution review process and in particular amend article 23(4) of the current constitution”*

It consequently follows that even though the constitution contains a right to “Protection of the Law it does not declare equality before the law or equal protection of the law. It is for this reason that in order to promote and enhance the protection of women’s rights, the Zambian bill of rights should take a leaf from the approach taken under the Ugandan Constitution which offers a good model for Zambia. For example Article 33 of the Ugandan Constitution stipulates;

*“(1) Woman shall be accorded full and equal dignity of person with men.*

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<sup>29</sup> Recommendation Number 33 of the Committee on Economic, Social and Cultural Rights in Zambia. UN. DOC. E/C. 12/1/ Add.106 (2005)

*(2) The state shall provide the formalities and opportunities necessary to enhance the welfare of women to enable them to realize their full potential and advancement*

*(3) The state shall protect women and their rights taking into account their unique status and natural maternal functions in society.*

*(4) Women shall have the right to equal treatment with men and that rights shall include equal opportunities in political, economic and social activities.*

*(5) Without prejudice to article 32 of the constitution, women shall have the right to affirmative action for the purpose of redressing the imbalances created by history, tradition and custom.*

*(6) Laws, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status are prohibited by this constitution”<sup>30</sup>*

The fourth concern that has been raised for the inclusion of economic, social and cultural rights in the bill of rights is in regard to the non-justiciable character of the “Directive Principles of State Policy” found in Part IX of the Constitution which has been seen as a hindrance to the full realization and enjoyment of economic, social and cultural rights. Therefore, even though the Constitution does mention economic, social and cultural rights in Part IX as “Directive Principles of State Policy,” Article 111 provides that:

*“The Directive Principles of State Policy set out in this part of the Constitution shall not be justiciable and shall not thereby, by themselves, despite being referred to as rights in certain instances, be legally enforceable in any court, tribunal or administrative institution or entity”<sup>31</sup>*

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<sup>30</sup> Constitution of The Republic of Uganda Article 33

<sup>31</sup> Constitution of Republic of Zambia Article 111

This clearly means that a *Zambian* citizen cannot go before any court of law and sue the government on the ground that their right to: health care services, education, shelter, social security, sufficient food, safe and clean water, employment, have been denied. The question that follows from here is that of what use is a right if one cannot claim it if it is violated? Surely such a right will not be of any use. Therefore, as the constitution currently stands, the state is expected to consider these rights( economic, social and cultural) in formulating and implementing its policies relating to development, law reform and application of law only in so far as state resources are able to sustain their application or if the general welfare of the public so unavoidably demands. As a result of this government is not legally obliged to provide for economic, social and cultural rights due to their non-justiciable character, it is, consequently, of no surprise that some high ranking government officials have in the past made strong comments such as “education is not a right in *Zambia*, because it is not enshrined in the Constitution” or “*Zambians* do not have a right to eat,” such statements are confusing and disturbing because they imply that certain basic rights for full development of the person are not the concern of our government. This position is indeed unfortunate as in today’s world; all categories of rights are considered to be equally necessary in ensuring dignity and peace for the individual. These rights are in essence, indivisible and interdependent. For example, a right to education and literacy (social right) is necessary for the enjoyment of the freedom of expression (civil right). Similarly, the right to a clean environment (solidarity right) is necessary for the enjoyment of rights to health (social right) as well as the right to life (civil right).

It consequently, suffices that there is need for Zambia to learn from countries like Malawi, Uganda and South Africa which have found ways of dealing with the application of economic, social and cultural rights as articulated in their constitutions. As an example the Malawian and South African constitutions allow citizens to have legal redress to ensure protection of economic, social and cultural rights and to ensure priority spending by government to comply with these rights as guaranteed in the bill of rights. In the case of the Malawian Constitution and specifically Article 14 on the “Application of Principles of National Policy” provides that the principle of National Policy:

*“Shall be directive in nature but the courts shall be entitled to have regard to them in interpreting and applying any provisions of this constitution”<sup>32</sup>*

Thus, the Malawian Constitution gives aggrieved citizens access to recourse through the courts of law, thereby making economic, social and cultural rights justiciable. When you consider the Zambian position, one thing that is clear is that both the Mvunga and Mwnakatwe Commissions recommended that some of the economic, social and cultural rights that the people demanded for should be in the “Directive Principles of State Policy” with a non justiciable character. The major reason cited for this preferred choice was concern about financial demands that would be attached to their realization as they would prove to be too expensive to bear implementation. It is because of this position taken by the Mvunga and Mwanakatwe Commissions that Professor Michello Hansungule rightly observes that:

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<sup>32</sup> Constitution of the Republic of Malawi Article 14



*“Even if the 1991 Constitution has been amended in its bill of rights provisions, it would still not have catered for social and economic rights”<sup>33</sup>*

However, the questions that remain and still needs to be answered are that for how long shall Zambia excuse herself from achieving these basic rights for its citizen? Is the status given to “Directive Principles of State Policy” a permanent solution and how long should we deal with the inadequacies or ineffectiveness noted earlier about our enforcement mechanism? Given the international position that no state, no matter how poor can excuse itself from taking steps to achieve economic, social and cultural rights and that these are obviously being achieved in a few countries worldwide, it is important to try and analyze the possibilities of an effective enforcement mechanisms as there is sufficient case law to demonstrate that these rights are indeed justiciable.

*“The most important instrument of vindication of human rights is the judiciary. However, if effective measures for vindication of such rights are lacking human rights cannot be realistically enjoyed by individuals”<sup>34</sup>*

Consequently, the courts must be ready to resolve human rights conflicts according to the law, whether this is through a special Constitution Court or through the High Court. Thus, economic, social and cultural rights will be meaningless if the courts do not vindicate them when they are violated:

*“Citizens must have easy access to the courts to ensure prompt adjudication of claims”<sup>35</sup>*

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<sup>33</sup> Professor Michello Hansungule (1999) “ An assessment of Zambia’s Performance Towards Social Development on the Eve of the Review of Social Summit” Report for Women Change Pg 33

<sup>34</sup> Kibwana Kivutha(1990):Fundamental Rights and Freedoms in Kenya, Nairobi: Oxford University Press

Using South Africa as an example economic, social and cultural rights are generally regarded as “Progressive Realization rights” in the constitution. Thus, their realization should be gradual. It is evident that over recent times the South African jurisprudence on socio-economic rights has made remarkable developments. The inclusion of economic, social and cultural rights in the bill of rights of the constitution was so as to ensure that the South African government took seriously its commitment to the constitutional founding principle of human dignity, justice and freedom. It is notable that these rights are formulated differently. For example section 26, which provides for the right to housing, section 27 which provides for access to health care, food and social security have been formulated in terms of the “right of access”. In order to realize these rights the state must take reasonable legislative and other measures within its available resources to achieve progressive realization of each of these rights.

Since the inception of the new South African Constitution in 1996, at least four (4) cases on socio-economic rights have been brought before the Constitution Court and out of these the court has ruled in favour of the plaintiff, especially ordering government to provide for these rights or to take “reasonable measures” towards realizing these rights.

The case of *TAC V THE MINISTER OF HEALTH* (2002)<sup>36</sup> which dealt with health rights as positive obligations was brought before the Constitutional Court. Here the applicants sought to compel the South African government and its relevant agencies to allow the provision of Anti-Retroviral drugs, Nevirapine or AZT to all HIV positive pregnant women in order to prevent mother to child transmission. It was argued that the use of Nevirapine to research and training sites could not be regarded as reasonable and

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<sup>35</sup> JCTR Report “Zambia’s Economic, Social and Cultural Rights: why should they be in the new Constitution” Pg 16

<sup>36</sup> *TAC V MINISTER OF HEALTH* (2005) (5) SA 721 (CC)

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<sup>35</sup> JCTR Report “Zambia’s Economic, Social and Cultural Rights: why should they be in the new Constitution” Pg 16

<sup>36</sup> *TAC V MINISTER OF HEALTH* (2005) (5) SA 721 (CC)

thus constituted a violation of the constitutional right to access to adequate health care. In its judgment the court held that it is impossible to give everyone access to a “core service” *immediately* and that all that can be expected of the state is that it acts reasonably to provide access to the socio-economic rights identified in section 26 and 27 on a *progressive* basis. However the states policy not to make Nevapine available in hospitals and clinics other than the research training sites was unreasonable and therefore fell short of meeting its obligations to devise and implement within its available resources a comprehensive and coordinated programme. As a remedy the court ordered that the government act “without delay” to provide Nevapine in public hospitals and clinics when this is medically indicated and to take reasonable measure to provide testing and counseling facilities at hospitals and clinics.

It is clear that Zambia can learn several things from the South African precedents. The first is to put economic, social and cultural rights and remedies clearly in the Bill of Rights of the constitution. Since the government is entrusted with the task of safe guarding citizens rights, the protection of the common good, it is thus, incumbent upon the state to:

*“...ensure availability of descent economic, social and cultural conditions for all citizens, especially those incapable of defending their rights and asserting their legitimate claims. In practice, the role of government should ensure that economic, social and cultural rights are respected and implemented in coordination with other rights so that each citizen may live a full human life and carry out his/her duties in the community.”<sup>37</sup>*

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<sup>37</sup> Ibid 18 Pg 16

## **CONCLUSION**

It has consequently been brought out by this chapter that one fundamental shortcoming of our bill of rights is its failure to incorporate economic, social and cultural rights among its protected rights and freedoms. On the other hand, this chapter has demonstrated that even though the Constitutions in Part(IX) does give mention to economic, social and cultural, these rights are however non-justiciable, hence, a citizen cannot take government before a court of law for failing to provide for these rights. Thus, the government in Zambia is at law not legally obliged to provide an adequate condition of living for its citizens. This situation is not helpful taking into account among other things the fact that:

*“...25 percent of the population had no access to health services. Another three million of the children in Zambia were not attending school...”<sup>38</sup>*

Taking the above observation, it is the position of this paper to echo calls by the Civil Society Organizations, the Church, the General Public and many others in calling for the inclusion of economic, social and cultural rights in the new constitution.

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<sup>38</sup> Florence shakafuswa of Justice for women and orphans project in Zambia addressing the UN Committee on Economic, Social and Cultural Rights (25<sup>TH</sup> April 2005)

## **CHAPTER THREE;**

### **WIDE LIMITATION OR CLAW BACK CLAUSES IN THE ZAMBIAN BILL OF RIGHTS**

#### **INTRODUCTION**

Part three of the Constitution of Zambia comprising of Articles 11-30 (inclusive) guarantees the fundamental rights and freedoms of the individual. As has been noted in the earlier chapter that the Zambian bill of rights is far from being adequate in its provision and protection of rights and freedoms. This chapter will now proceed to look at the second noted deficiency of the bill of rights and this weakness emanates from the wide limitation clauses that characterize our bill of rights and to achieve this, this paper will look at this weakness under two headings and these are: (a) Limitation provisions during the time of peace and stability and (b) Limitation provisions during a declaration of a state of emergence or times of war. This categorization it must be pointed out is for convenience only: it is not meant to be rigid but fluid since the two categories are mutually complementally.

#### **(1) Limitation Provisions During the time of peace and stability**

The enjoyment of rights under the bill of rights is made subject to a number of limitations: respect for the rights and freedoms of others, and the public interest. In

addition to these two general limitations which apply to all the guaranteed rights, most of the protected rights contain numerous limitation or ‘claw back’ clauses. The format adopted is that the right is first protected in broad terms, and then qualified by outlining circumstances in which that right might be made limited. It is the position of this chapter that in many instances the qualifications to the rights are so numerous and wide-ranging as to negate the right or render it meaningless. This method adopted in the drafting of the bill of rights is in marked contrast for example to the American Bill of Rights, which outlines individual rights and freedoms broadly without qualifying them and an example of this is the 1<sup>st</sup> Amendment which provides that:

*“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people to assemble and to petition government for a redress of grievances”*<sup>39</sup>

In another example the Canadian Charter of Rights and Freedoms is also in marked with the Zambian Bill of Rights, rights and freedoms in the Charter are stated broadly without qualifications. For example Article 2 provides that:

*“Everyone has the following fundamental freedoms:*

*(a) Freedom of conscience and religion;*

*(b) Freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;*

*(c) Freedom of peaceful assembly; and*

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<sup>39</sup> 1<sup>st</sup> Amendment of the American Bill of Rights

*(d) Freedom of association”<sup>40</sup>*

As regards permissible limitations, Article 1 of the Canadian Charter provides that:

*“The Canadian Charter of Rights and Freedoms set out in it subject to such reasonable limits prescribed by law as can be demonstrably justifiable in a free and democratic society”<sup>41</sup>*

The effect of this provision is that it imposes on the state the burden of proving that the limits placed on the exercise or enjoyment of a particular right or freedom are reasonably justified in a free democratic society. Consequently, a person who is aggrieved need only to show that his rights or freedoms have been violated under a particular law. It is, thus, clear from this that this position makes it much easier for an individual to bring a human rights suit against the government than is the case under the Zambian constitution.

It can, thus, be observed from the above that under the American Bill of rights and the Canadian Charter on Rights and Freedoms that the courts have greater discretion in interpreting the rights guaranteed than do the Zambian courts. Looking at the Zambian bill of rights it is apparent that some of the guaranteed rights have a wider scope than others. For example, Article 14 of the Constitution provides that *“No person shall be held in slavery or servitude”<sup>42</sup>*. This article is defined in a language that admits of no exceptions. On the other hand, other guaranteed rights have wide limitation clauses. Among the rights that have wide limitation clauses include freedom of: conscience, expression, equal protection of the law. Others are freedom of movement and freedom from discrimination.

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<sup>40</sup> Article 2 of the Canadian Charter of Rights and Freedom

<sup>41</sup> Ibid Article 1

<sup>42</sup> Article 14 of the Zambian Constitution



The effect of these claw back clauses is that they allow the legislature to enact laws that might result in the taking away of the substance of the rights granted. The only fetter placed on the legislature is that such laws has to be *reasonably required in the interest of defence, public safety* and it has to be *reasonably required for the purpose of protecting the rights and freedoms of others*.

*“Thus, a person challenging the validity of a law that violated a guaranteed right has to show that the law or the act done under it was not reasonably justified in a democratic society”<sup>43</sup>.*

This burden is more difficult and is in marked contrast to the above noted provision of the Canadian Charter of Rights and freedoms which places on the state the burden of proving that the limits placed on one’s enjoyment of a particular right or freedom is reasonably justified in a democratic society and all that the person had to show was that his rights or freedoms have been violated.

It, therefore, suffices that the requirement that a person challenging the validity of a law violating his rights needs to show that such a law or act done under that law is not reasonably justified in a democratic society, can prove to be problematic in the sense that the precise limits of the rights and freedoms was dependant on how the courts construes the phrase *“reasonably justifiable in a democratic society.”* It is needless to mention that such an interpretation will inevitably be influenced by the social, philosophical and the scale of value placed on public interests by the court. Since the Constitution does not

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<sup>43</sup> Professor Alfred. W. Chanda: *A Case Study in Human Rights ,Common wealth Africa: Thesis submitted to Yale University (1992) Pg 113*

define what constitutes a “*democratic society*” the court has to ascertain what the phrase means.

Having established that even though rights are provided for in general wording and then conditions laid down under which these rights and freedoms can be limited and how these limitations enable the legislature to enact laws which may have the effect of taking away these guaranteed rights; this chapter will now proceed to look at some of the Articles in the bill of rights as examples. The articles that are going to be looked at as examples include the rights to; life, protection for privacy of home and other property, protection of the freedom of expression .It should also be mentioned that bearing in mind the fact that the bill of rights has remained literally the same since it’s introduction in the 1963 Constitution, some of the cases and examples that will be cited will date as far back as the First and the Second Republics.

### **(a) Right to Life**

The right to life is provided for under Article 12<sup>44</sup> and it provides that no person can be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law in force in Zambia of which he has been convicted. In addition to the death penalty and death in war, death is permissible where reasonable force was used to:

*(a) Defend any person from violence or to defend property*

*(b) Effect a lawful arrest or to prevent the escape of a person lawfully detained*

*(c) Suppress a riot, insurrection or mutiny; or*

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<sup>44</sup> Article(12 ) of the 1996 *Zambian Constitution*

*(d) Prevent the commission by that person of a criminal offence*

It has been noted that through the use of the above limitation provisions, the right to life has been widely violated since independence. As an example it is a well known fact that on many occasions the Police broke up riots, demonstrations and strikes by using excessive force resulting in many deaths and an illustration of this was: an incident were Police in Luapula Province in June 1985 shot dead two high school pupils and injured a third in a bid to stop a student demonstration against brutality by teachers at Mwense Secondary School.<sup>45</sup> It is evident that such violations of the right to life can be said to be within the boundaries of the law as they fall under a provided limitation clause.

Furthermore, Police Officers are also in the habit of indiscriminately killing suspects who have in some instances been unarmed and even innocent. To illustrate this, on January 4, 1980 Police fired into a Zambia Sugar Company mini-bus which was rushing a pregnant woman to hospital, killing two people and critically injuring two others.<sup>46</sup> In the year that followed in November (1981) paramilitary police opened fire on an ambulance belonging to Mining Contractors, which was rushing a sick child to Ndola Central Hospital, killing the driver, Francis Mulenga and the father of the child Abel Mwango.<sup>47</sup> In a much more recent development the police in Lusaka's Ng'ombe Compound shot dead two teenagers after they refused to leave a funeral house. This shooting resulted in riots in the compound and the destruction of more than twenty vehicles parked at the local Police station (Post Newspaper of 16<sup>TH</sup> October 2006)

It was because of such violations of the right to life by our law enforcement officers that in a case where a Paramilitary Officer was tried for manslaughter that the High Court

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<sup>45</sup> *Times of Zambia, June 12, 1985 at Pg 1*

<sup>46</sup> *Times of Zambia, January 5, 1980*

<sup>47</sup> *Times of Zambia, November 26, 1981 at Pg 1*

Commissioner Edward Chisengalumbwe, condemned the indiscriminate way in which Policemen used firearms on suspects:

*“The way guns carried by Police are used these days would remind one of Chicago in the days of Al Capone. Sometimes they are carried as if they are meant to frighten people.”*<sup>48</sup>

The Commissioner proceeded to say that the Police firing at people had become:

*“Very, very prevalent in Zambia, while the idea is to scare away would be robbers, I don’t think the use of firearms against suspects should be encouraged. Day in day out we are reading about suspects being short dead by Police. In the end this Republic is becoming frightening because of such incidents”*<sup>49</sup>

On the other hand, a number of suspects have died in Police custody in suspicious circumstances and an illustration of this is the case of a suspect Chitalu Mwansa who died at a Police station in Luanshya after being kicked, punched and having his testicles smashed during interrogations.<sup>50</sup>

It is therefore the position of this paper that some of the above violations of human rights could be avoided if the number of limitation clauses from the right to life provided for in the bill of rights are reduced because as has been observed that most violations by the Police have been defended by saying that they fall within the provision of the law.

#### **(b) Protection for Privacy of home other Property**

Article 17 which covers the right to protection of privacy of home and other property provides that except with his own consent no person could be subjected to the search of his person or his property or the entry by others on his premises. However, the

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<sup>48</sup> *Times of Zambia*, April 10, 1984, at Pg1, col 9

<sup>49</sup> *Ibid*

<sup>50</sup> *Times of Zambia*, July 15, 1981 at Pg 1

succeeding provisions proceed to emasculate this protection by providing that nothing contained in or under the authority of any law shall be held to be inconsistent with or in contradiction of the protected right to the extent that the law in question, inter alia, made provisions:

(a) *That it is reasonably required in the interest of, defence, public safety, public order, public morality, public health, town and country planning....*

(b) *That it is reasonably required for the purpose of protecting the rights or freedoms of other people.*<sup>51</sup>

Thus, for such a law or anything done under it to be considered invalid it has to be shown that it was not *reasonably justified in a democratic society*. The protection of privacy of home and other property was discussed in the case of **Patel V Attorney General**<sup>52</sup>. Facts of this case were that Patel was charged in a subordinate court with contravening Regulation 35 of the Exchange Control Regulation, 1965, by attempting to externalize Zambian currency to London. He allegedly placed in the Post at Ndola 65 Airmail envelopes containing Zambian currency, which were discovered by a customs officer. The customs officer opened, examined and seized the postal articles without a search warrant. When Patel complained that this constituted a violation of his constitution rights, the Senior Resident Magistrate referred among others the following question to the High Court under section 28 ( current Article 28(2)(a) ) of the Constitution for consideration:

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<sup>51</sup> Article (16 ) of the Zambian Constitution

<sup>52</sup> *Patel V Att- Gen HP/Reg. 1/1968 (unreported)*

(i) *Did the opening, examination and seizure of the Postal articles constitute a contravention of the applicants right to privacy of property as guaranteed by section 19 (current Article17) of the Constitution?*

In answering this question the court held that this right was not infringed as Regulation 25, under which the customs officer purported to act, was reasonably required for the purpose of development or utilization of property for a purpose beneficial to the community. This fell within one of the permitted limitations.

These invasions on the right to privacy have to some extent been encouraged by the fact that courts admit illegally obtained evidence and this position was discussed in the landmark case of **Liswaniso V The People**<sup>53</sup>. In this case the applicant, a Police inspector was convicted of official corruption. He was alleged to have received a sum of 80 Kwacha in cash as consideration for the release of an impounded vehicle belonging to the complainant. The evidence on which he was convicted was procured by means of a trap: the handing over of the money was pre-arranged with the Police. The money was later recovered from the applicant's house during a search conducted pursuant to a search warrant. It was not in dispute that at the time the Police officer in question applied for a search warrant to be issued he swore that the money in question was in the applicant's house when in fact it was in the Police officer's own possession. The applicant argued that the resultant search was therefore illegal and inadmissible in evidence. The Supreme Court held that evidence illegally obtained, for example as a result of an inadmissible confession is if relevant admissible on the ground that such evidence is a fact (i.e. true) regardless of whether or not it violates a provision of the Constitution or some other law.

It has, therefore been observed that:

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<sup>53</sup> *Liswaniso V The People* (Supreme court 1976)

*“The acceptance by the court of illegally obtained evidence seriously undermines the constitutional protection for privacy of home and other property”<sup>54</sup>*

Thus, the protection afforded by Article (17) is for all practical purposes meaningless as it does not deter agents of the state from conducting illegal searches. Furthermore, the limitations are so wide that almost any law could be made to fit into one of the exceptions.

### **(c) Protection of Freedom of expression**

Another right and freedom provided for by the bill of rights is the freedom of expression which is guaranteed by Article (20) and it encompasses freedom to hold opinions without interference, freedom to receive ideas and information without interference. However, this freedom is not absolute as Article (20) permits limitations:

*(a) That are reasonably required in the interest of defence, public safety, public order, public morality or public health; or*

*(b) That are reasonably required for the purpose of protecting regulations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence.”<sup>55</sup>*

It can be noted that these limitations are so wide as to render the freedom of expression almost meaningless as almost any law or practice could be made to fit within one of the derogations. The only test that such limitation has to meet is that it is reasonably required

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<sup>54</sup> Professor A. W. Chanda: *A Case Study in Human Rights, Commonwealth Africa: Thesis Submitted to Yale University (1992) Pg156*

<sup>55</sup> Article (20 ) of the Constitution of Zambia

in a *democratic society*; phrases which do not easily lend themselves to unambiguous definitions. As a consequence of these wide derogations, several laws, regulations and practices have operated to severely restrict freedom of expression in Zambia and an illustration of this is Section 53(1) of the Penal Code which grants the President absolute discretion to prohibit any publication, published within or outside Zambia that he considers to be contrary to the public interests<sup>56</sup>. What constituted public interest is something within his discretion. Therefore, anyone who imports, publishes, sells, offers for sale, distributes or reproduces any prohibited publication is liable to imprisonment for up to three years.<sup>57</sup>In addition section 69 of the Penal Code seeks to protect the President's reputation and the dignity of his office, hence, it provides that any person who with intent to bring the President into ridicule or contempt, publishes any defamatory or insulting matter whether by writing, printing, word of mouth or any manner is guilty of an offence and is liable on conviction to imprisonment for three years<sup>58</sup>From these provisions it is evident that these provisions have a chilling effect on freedom of expression as almost any criticism of the government or the president can be termed seditious or defamatory because of the wide sweep of these provisions. This inevitably stifles public debate on matters of national importance as many people are too scared to speak up.

Having looked at some of the provisions under which guaranteed rights and freedoms can be taken from an individual in times of peace and stability, this paper will now proceed to look at how the rights and freedoms of an individual can be suspended in times of war or a declaration of a state of emergency.

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<sup>56</sup> *Penal Code Section 53*

<sup>57</sup> *Ibid Section 54*

<sup>58</sup> *Ibid Section 69*



## **(2) Limitations in times of War or Declaration of a state of Emergency**

Apart from the usual provisions permitting the restriction of the individual rights and freedoms for special reasons in the Zambian Constitution, Article 25 provides that: Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contradiction of Articles 13, 16, 17, 19, 20, 21, 22, 23, or 24 to the extent that it is shown that the law in question authorizes the taking during any period when the Republic is at war or when a declaration under Article 30 is in force, of measures for the purpose of dealing with any situation existing or arising during that period: and nothing done by any person under the authority of any such law shall be held to be in contravention of any of the said provisions if it is shown that the measures taken were having due regard to the circumstances prevailing at the time reasonably required for the purpose of dealing with the situation in question.<sup>59</sup> Under Article 29 the President may after consultation with cabinet declare war<sup>60</sup>, whilst, he may make a Declaration of Public Emergency after consultation with cabinet and publication of the proclamation in the Gazette under Article 30.<sup>61</sup> The effect of the above provisions of the bill of rights is that some of the rights and freedoms of the individual may be suspended during the time of war and public emergency. The only exceptions to Article 25 are: the right to protection from slavery and forced labor, protection from inhuman treatment and the provision to secure protection of the law. Thus, these three rights are the only non-derogable rights even in times of war and public emergency.

An obvious drawback in the Constitutions of Zambia is what constituted an emergency is not defined. The natural meaning of the word “emergency” is capable of covering a wide

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<sup>59</sup> Article 25 of the Zambian Constitution

<sup>60</sup> Article 29 of the Zambian Constitution

<sup>61</sup> Article 30 of the Zambian Constitution

range of situations and occurrences. As Lord Dundin Observed when delivering the Judgment of the Privy Court in **Bhagat Singh V King Emperor**:

*“A state of emergency is something that does not permit any exact definition: it connotes a state of matters calling for drastic action....”*<sup>62</sup>

Furthermore, the question of what is reasonably justified in an emergency was considered in the Nigerian case of **William V Majekodunmi**<sup>63</sup>: in this case the applicant was placed under a restriction order under the Emergency Powers (Restriction) Regulation, 1962. He successfully challenged the restriction on his liberty and the Federal Supreme Court held that measures taken against individuals under the emergency laws should only be such as are reasonably justified for the period of emergency in order to accord with the fundamental rights provision against deprivation of personal liberty. Ademola, F. C. J. said:

*“If they (human rights) are to be invaded at all, it must be only to the extent that is essential for the sake of some recognized public interest and may not be further.”*<sup>64</sup>

In contrast to the Zambian Constitution, both the Constitutions of Ghana and Nigeria define what constitutes a state of emergency (whether in the Federation as a whole or part of it) may be proclaimed in the following circumstances: war, the imminent danger of invasion; actual breakdown of public order and safety. Under the Constitution of Nigeria a state of emergency (whether in the federation as a whole or part such as to require

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<sup>62</sup> *Bhagat Singh V King Emperor* (L. R 58 I. 169)

<sup>63</sup> *William V Majekodunmi* (1962) 1 ALL N. L. R. 413

<sup>64</sup> *Ibid*

extra-ordinary measures or clear and present danger thereof); an occurrence of imminent danger clearly threatening the existence of the federation...<sup>65</sup>

These provisions, unlike those in the *Zambian Constitution* are quite commendable for they check the President's discretion to declare an emergency. Furthermore, they prescribe the only circumstances under which an emergency can be declared. The importance of such provisions emanates from the observation that in some instances declarations of states of emergency have been made not because of existing or eminent danger, but as a way of dealing with individuals who are perceived as anti-government. An example of when emergency powers have been employed against political opponents was in the 1973 case of William Chipango a former mayor of Livingstone, and four others, who were arrested and detained for allegedly preparing to overthrow the government on or about January 30, 1973. They allegedly recruited 100 men and sent them to Namibia for military training in order to effect their plan. While in detention they were tried in the High Court in May 1973, which convicted them of treason and sentenced them to death. However, they were acquitted by the Supreme Court in October 1978 on account of thoroughly unsatisfactory evidence adduced by the Prosecution. Despite, the acquittal they were not released until May 8, 1979, having spent 7 years in detention<sup>66</sup>.

Other examples of detentions which followed on grounds of trying to overthrow the government were in 1980, 1989 and even 1997 and in some instances government did not bring those detained for trial for treason and it is only fair to assume that government did not have credible evidence against them. Therefore, their long detentions were a travesty

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<sup>65</sup> *Section 265 of Constitution of Nigerian*

<sup>66</sup> *Zambia Daily Mail, May 9, 1973 at Pg 1*

of justice and a gross abuse of the power to detain as they were detained simply because they had opposed the government policies.

The effect of emergency provisions under Article 30 seems to be that the declaration by the President cannot be challenged before the courts of law. Thus, once the President has declared a state of emergency, the power of the court is limited to determining whether the declaration has been approved by a resolution of the National Assembly or not. This lack of judicial review is a threat to the guaranteed rights since human rights like the freedom of: movement, assembly, expression, association and many others are completely taken or severely restricted and an individual cannot seek redress from the courts to review the declaration.

The question of the justiciability of the power to declare an emergency arose indirectly in the case of **Kapwepwe and Kaenga V The Attorney General**<sup>67</sup>, where the applicants contended, inter alia, that the use of emergency powers to detain them exceeded anything which might reasonably have been thought to be necessary. Baron, J. P. upholding the detention, commented, obiter:

*"It is not open to the courts to debate whether it is reasonable for there to be in existence a declaration under section 29(which I will call for convenience a state of emergency)"*<sup>68</sup>

Unfortunately, since it was merely a periphery issue it was not fully examined by the Court of Appeal. However, in the case of **Dean. N. Mung'omba V The Attorney General**, the applicant, a leader of an opposition political party was arrested and detained

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<sup>67</sup> *Kapwepwe and Kaenga V Att-Gen* (1972) ZR 248 at 263

<sup>68</sup> *Ibid*

under emergency regulations following the abortive coup by some soldiers on 28<sup>th</sup> October 1997. He applied for a writ of habeas corpus. He argued, inter alia, that the President had abused his powers to declare an emergency as the facts on the ground did not justify the declaration of any emergency. The court just like in the above mentioned case of Kapwepwe, held that it had no jurisdiction to enquire into reasons for the declaration of a state of emergency. The court stated that:

*“I find that the President is not obliged to furnish any reasons for making a declaration and such inquiry would in my view be ultra vires the powers of this court because the only condition that the President is required to fulfill is to meet and consult his cabinet before declaring that a state of emergency exists”<sup>69</sup>*

The court in this case noted that jurisdiction to ensure that Constitution provisions relating to an emergency declaration have been complied with lies with the National Assembly. Once the National Assembly has by majority of all members approved the declaration of a state of emergency, the issue is laid to rest. This attempt to check the powers of the President is a very weak one and thus, bearing in mind the fact that the National assembly has in the past been used as a mere rubber-stamp due to the fact that it has always been one party dominated, hence, leaving the rights of the individual at the mercy of the executive. This position emanates from the fact that an emergency declaration brings into effect the Emergency Powers Act which empowers the President to make regulations, which, inter alia, may provide for indefinite detention of people without trial, imposition of curfews, restrictions of freedoms of expression, assembly, association and many others.

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<sup>69</sup> *Dean Mung'omba V The Att-Gen (1997/HP/26170*

## **CONCLUSION**

Having highlighted the circumstances under which individual rights can be limited under the Zambian bill of rights, it should be mentioned that it is not the position of this paper that rights should be absolute as this is not practically possible, but that there should be a reduction with the number of limitation clause as wide limitation clauses always have the effect of negating the very rights the bill of rights seeks to protect.

## CHAPTER FOUR: THE USE OF GENDER BASED LANGUAGE IN THE ZAMBIAN BILL OF RIGHTS.

### INTRODUCTION

Human rights are rights that one has as a result of being a being human. No other qualifications are required for one to be entitled to human rights. These rights serve a number of purposes:

- (i) They protect human dignity*
- (ii) They are essential for individual well being and*
- (iii) They are necessary for the preservation of peace and justice<sup>70</sup>*

It is, therefore, apparent that these rights must be enjoyed irrespective of one's gender, religion, tribe, race, colour or social status. Thus, in modern times these rights are protected by means of being enshrined in the Bill of Rights of the constitution. The Bill of Rights guarantees the rights and fundamental freedoms of the individuals. It is because of its importance that the Bill of Rights in Zambia and indeed in many other jurisdictions is entrenched in the constitution so as to make it difficult to be tempered with. However, when this important part of the constitution in the protection of individual rights has its weaknesses, the rights of the people suffer most and it is from here that this chapter will now endeavour to look at another noted deficiency of Bill of Rights and this in line with the fact that the Zambian Bill of Rights is couched in a language that is gender unnatural and furthermore, that the language in it employs is in most cases too technical for an ordinary Zambian.

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<sup>70</sup> See L HENKIN: *THE AGE OF RIGHTS* (1990): *Universal Declaration of Human Rights 1958*

### **(a) Use of Gender biased Language**

From the above noted purposes of human rights given by L. HENKIN, it is clear that human rights are supposed to be gender neutral. However, this is only in theory and not in practice. From time immemorial, women have always been discriminated in many different ways. This discrimination has either been directly or indirectly. The grounds that have been applied in the discrimination against women include sex, pregnancy, maternity, marital status, family and household responsibilities. It is in this vein that UNDP's annual Human Development Report bemoaned that:

*"In no society are women secure or treated as equal as men. Personal insecurity shadows them from the cradle to the grave. From childhood, they are abused because of their gender."*<sup>71</sup>

It, therefore, suffices that these abuses deprives women of their fundamental human rights. Under the Zambian Bill of Rights, Article 11 is cardinal as it sets out the foundation of the bill of rights. Furthermore, in relation to our subject its importance is in line with the fact that it makes reference to non-discrimination in any circumstances. It provides that:

*"It is recognized and declared that every person in Zambia has and shall continue to be entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinion, color, creed, sex or marital status, but subject to the limitations contained in this part, to each and all the following:*

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<sup>71</sup> Lawrence Mukuka, Honrine Muyoyeta; *A Baseline Study on Violence Against Women in Zambia*. Dept of Social Development, University of Zambia, Lusaka



*(a) Life, liberty, security of the person and the protection of the law ....*<sup>72</sup>

However, it is important to observe that although the Zambian bill of rights provides protection of human rights and fundamental freedoms, one cannot completely rely on it as a tool in the fight against gender discrimination. To begin with, there is no special reference to women in Zambian Constitution. This is in sharp contrast to other African Constitutions and a good example of such a constitution is the Ugandan Constitution (Article 33) it is for this very reason that we have to rely on the principle of non discrimination found in the constitution in order to effectively extend the enjoyment of human rights to women. In addition, the Zambian constitution does not embody the principle of equality of men and women, as is the case with the South African and Ugandan Constitutions. Furthermore, the constitution does not allow discrimination in circumstances that are reasonably justified in a democratic society and it is in this line that T.K. Mabula observes that:

*“The Constitution’s permission of discrimination in matters of divorce, marriage, devolution of property and other matters of personal law and the application of*

*Customary laws are problematic for the human rights of women. Most of the instances of denial of human rights to women lie in this sphere.*<sup>73</sup>

It is because of this “*direct*” discrimination that it can be said that women occupy an inferior legal status than their male counterparts. Women are considered perpetual minors in several respects.

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<sup>72</sup> Article 11 of the Zambian Constitution

<sup>73</sup> Tukiya K. Mabula, *The Enforcement of Human Rights of Zambian Women*, *Zambia Law Journal*, Volume 21-24 at Pg 34

However, of particular interest to this chapter is one form of discrimination against women in the Zambian bill of rights, which can be termed for convenience purposes as “indirect discrimination” against women. In noting this weakness of the bill of rights, Professor Alfred Chanda observes that:

*“The bill of rights is not expressed in gender neutral language. It uses the masculine terms ‘he’ or ‘his’ in describing the person who is entitled to the rights.”<sup>74</sup>*

Even though this form of discrimination against women may seem to be less apparent when compared to the one noted above, it is a well known fact that in most African Societies, Zambia inclusive, the lived reality of women in the various family forms and control of resources shows that the power relations between men and women continue to be unbalanced in favour of men, hence, any forms of discrimination including the use of gender biased language in our laws does not help in alleviating the view that women are some inferior being when compared to men. Therefore, the point being made about the use of gender biased language as observed by Tukiya Kankasa Mabula is that:

*“.... It encourages the attitude that men and women are different and cannot be treated equally, hence, people holding such attitudes will not facilitate conditions for equal opportunities of the sexes. This consequently leads to the belief that women are indeed inferior.”<sup>75</sup>*

In appropriating the magnitude of the gender inequality violations of women’s rights and the lack of will to address the situation, Mrs. Lillian Mushota a practicing lawyer and lecturer in the School of Law at the University of Zambia, states as follows:

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<sup>74</sup> Prof A. W Chanda *The Zambian Bill of Rights* (untitled notes)

<sup>75</sup> Tukiya Kankasa *The Status of Zambian Women: Law and Reality 1979-80* Obligatory Essay

*“We must address the looking of our society. The looking glass of mirror reflects the rights (or lack of rights) of all people, the strategies (or lack of strategies) for the promotion and protection of these rights (if any) and the provision of and access (or lack of access) to services.”*<sup>76</sup>

This is reminiscent of Ghandi’s statement that the levels of civilization of a society can be judged by the manner that it treats its most vulnerable.<sup>77</sup> Thus, bearing in mind the fact that women in Zambia are indeed among the most vulnerable groups in society, it is unfortunate that the bill of rights which is supposed to protect them (women) should continue to promote the view of women being inferior through the use of gender biased language. Therefore, taking into account the fact that law is central to gender issues as it cuts across all sectors, there is need to repeal and reform all laws, amend the constitution and change social practices which still subject women to discrimination and enact empowering gender sensitive laws. Thus, to enable the attainment of equality, there is need to do everything possible to eliminate the ‘*linguistic sexism*’ words and expressions that tend to make women feel disparaged, hence, there is need to:

*“(a) Avoid the generic use of the word ‘man’ both by itself and in compounds such as ‘mankind’ substitute words such as humanity, human beings, humans, persons.*

*(b) Avoid the masculine pronouns such as ‘he’ or ‘his’ to men and women”*<sup>78</sup>

The continued use of discriminatory terms such as gender biased language by the Zambian bill of rights flies in the face of the many international and regional instruments to which Zambia is a party. For example, the United Nations (UN) Charter, as well as the

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<sup>76</sup> Mushota. L. *The Problem of Protecting Women’s Rights; The Zambian Case. (A paper presented at the seminar of Human Rights and the law at ZIALE, 13-17 July 1998 at pg 2*

<sup>77</sup> *ibid*

<sup>78</sup> Kashumba. B. Nellie. *The Legal Status of Women in Zambia 1978-79 Obligatory Essay*

Universal Declaration of Human Rights (UDHR) have proclaimed and agreed that non-discrimination and equality of treatment are cardinal norms of the International Human Rights law. In Article 1 of the UDHR, it has been declared that all human beings are born free and equal in dignity and rights and that (Article 2) everyone is entitled to all the rights and freedoms sets forth in the declaration without distinction as to race, colour, sex, language, political opinion and other opinion, national or social origin, property, birth or other status. It can therefore be deduced from the above provisions that to have a human right one need not do anything special other than be born a human being. It consequently, follows that since all human beings have the same basic nature and have it equally, the rights based on this nature must be universal and held equally by all. In the same light it can be asserted that:

*“...Human rights are universally applicable, inherent, inalienable, equal, non discriminatory, indivisible and inter dependant”<sup>79</sup>*

Considering the above raised issues, it can be said that on the rights of women is in essence a call for human rights and this basically entails a call to put to an end all discrimination against women, including the use of gender biased language and in this chapter discrimination against women can be said to be:

*“Any distinction, exclusion or restriction made on the basis sex, which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women of*

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<sup>79</sup> Marek, Piechowiak *What are Human Rights ? The Concept of Human Rights and their Extra Legal Justification . An Introduction to the Protection of Human Rights.* 2000, pg10

*human rights and fundamental freedoms in the political, economic, social, cultural civil or any other field”<sup>80</sup>*

The rationale behind the notion of equality, according to one scholar is that once irrelevant criteria like the use of gender biased language which make people different and which they cannot do anything about (e.g. race, color, tribe, or sex) are removed, all individuals should be treated equally.<sup>81</sup> In addition to the UN Charter and the UDHR, many other instruments have condemned the discriminatory practices against women and one such Instrument is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). This is the main instrument for the promotion and protection of women's rights and it came into force on 3<sup>rd</sup> September 1981 and Zambia became a party in 1985, thus, when you look at Southern Africa, all but one SADC countries (Swaziland) have signed or acceded to CEDAW. By adopting the convention the state party expresses its determination to adopt the measures required for the elimination of discrimination against women in all forms and manifestations and this includes the use of discriminatory language in pieces of legislation. Article 1 of CEDAW is of paramount importance (see footnote 11). In Article 5 the convention stipulates that parties endeavor to help men and women to overcome predetermined, sexually stereotyped role behaviors and false concepts of inferiority or superiority of either sex. This is a vital article since most societies including Zambia, is blinded by such concepts and must, hence, be enlightened. It is in this vein that Article 2 (1)(e) of the convention obliges state parties to:

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<sup>80</sup> Article 1, *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*

<sup>81</sup> Tembo, L. *A National survey on Sex Biases in Zambian Textbooks in Primary and Secondary Schools and their Importance and their implication on Education in Zambia.* (UNESCO) Pg21

*“.... (d) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.*

*(e) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”<sup>82</sup>*

Thus, by becoming parties to the women’s convention, parties agree to condemn discrimination in all its forms and as a party to the convention, Article 5 of the convention obliges Zambia to take all appropriate measures to eliminate discrimination against women and one way of achieving this is by ensuring that the most important of the constitution in the protection of individual rights and freedoms; the bill of rights, is couched in a language that is non discriminatory in relation to one’s gender. It is for this reason that Justice J.C. Mutale observes:

*“It is my argument that a state that ratifies this should own up and automatically take all steps against all forms of discrimination.”<sup>83</sup>*

It should be mentioned that the above call by Justice Mutale has not been a lone one as other persons and organizations have made similar calls. For example, following the appointment of the Mwanakatwe Commission, the government accepted the commission’s recommendation that the future constitution should adopt a language that is gender neutral. Further the commission recommended that government should progressively work towards adopting a gender-neutral language for all the laws of the

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<sup>82</sup> Article 2 (d) (e) CEDAW

<sup>83</sup> Mabula, *International Protection of Human Rights of Children, with Appropriate Reference to Zambia.* (A paper presented at the Human Rights Seminar held at ZIALE, 13-17 July 1998) at Pg 9

Republic. It is indeed unfortunate that even though these recommendations were accepted by the government, they have to date not been implemented. In the same vein, the Mun'omba CRC in its draft constitution in Article 39 states that every person has the right not to be discriminated against, directly or indirectly, on any grounds including race, sex, pregnancy, health, marital status, origin, color, age, disability, religion, conscience, belief, culture, language or birth.<sup>84</sup> This is clearly a continuation of calls to have a constitution and in our case a bill of rights which does not discriminate either directly or indirectly through the use of gender biased language.

## CONCLUSION

Bearing in mind the fact that every person has an inherent dignity and the right to have his dignity respected and protected and that every person is equal before the law and has the right to equal protection and benefit of the law, it has been shown by this chapter that discrimination on the grounds of one's sex or indeed any other ground is a clear violation of one's human rights and this includes women. It has further been elucidated that it is not in every instance that discrimination will be direct as it can also occur indirectly through the use of gender biased language in important documents like the bill of rights of the constitution, which is the part of the constitution which seeks to guarantee the rights of the individual

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<sup>84</sup> *Mung'omba Draft Constitution Article 39*

## CHAPTER FIVE: THE PERMANENT HUMAN RIGHTS COMMISSION (PHRC)

### INTRODUCTION

Having looked at the rights guaranteed by the *Zambian Bill of Rights*, it emanates that it is important to have a mechanism of seeking redress in the event of the guaranteed rights being violated. Consequently, Article 28 of the constitution provides the means of getting redress if an individual's rights are being or are likely to be violated and this is by way of filling a complaint in the High Court<sup>85</sup>. It, however, arises that the implementation of human rights norms and standards at national level requires practical measures. One of such measures is the establishment of a national human rights commission charged with human rights monitoring, promotion and protection<sup>86</sup>. It is for this reason that this chapter will look at a body though not provided for under the bill of rights, but lays a vital role in the monitoring, promotion and protection of individual rights and this is the Permanent Human Rights Commission (hereinafter PHRC) of Zambia provided for under Part XII (Articles 125 and 126) of the constitution. In addressing this subject, this chapter will first of all endeavor to lay down the background of the PHRC, its composition, mandate and powers before looking at the weaknesses which is the main area of interest of this chapter.

### BACKGROUND

The conception of the PHRC owes its 'genesis', so to speak, from a commission of inquiry set up by President Chiluba in may 1993 to investigate violations of human rights by past governments. However, after both internal and international

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<sup>85</sup> *Article 28 of the Constitution of Zambia*

<sup>86</sup> *Prof C. Anyangwe Introduction to Human Right and International Humanitarian Law Pg 208*



pressure, the MMD government allowed the commission of enquiry to investigate violations of human rights even in the period after the end of the UNIP era i.e Third Republic<sup>87</sup>. The Munyama Commission, headed by prominent lawyer Bruce Munyama held public hearings through out the country and among other things exposed the use of torture in secret detention centers through out the country.<sup>88</sup> According to its findings, the commission reported that close to 1000 people had been detained and tortured. Significantly, the commission also highlighted that torture and other violations of human rights were occurring on a significant scale in the MMD's third republic. In its report handed to government on July 1, 1995, among its recommendations was that: victims of state security abuses be compensated, but it did not propose that offenders be prosecuted<sup>89</sup>. It also recommended the creation of a Permanent Commission to deal with human rights issues.

The government's white paper relating to the findings of the Munyama Human Rights Commission was not released until a year later on October 1, 1996. However, a leaked paper of the commission's report was published in the POST NEWSPAPER OF February 12, 1996. In the white paper it was announced by government that it had intentions of establishing a permanent human rights commission that would submit annual reports to the President and Parliament.

Following the Munyama Commission's suggestions, in 1996 government amended the constitution to provide for a Permanent Human Rights Commission (PHRC) under articles 125-126. The Human Rights Act of 1997 was passed by

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<sup>87</sup> Sakala J.B *Protection and Promotion of Human Rights in Zambia* Pg 12

<sup>88</sup> *Report of the Human Rights Commission of Inquiry, September 6*

<sup>89</sup> *ibid*

the Zambian Parliament on March 13, 1997 and signed into law by the President the following day. The Human Rights Commission Act was billed as a central pillar of the MMD's efforts of legal reforms. President Chiluba appointed then High Court Judge, Lombe Chibesakunda to chair the PHRC together with 5 others<sup>90</sup>. Despite, the ratification of the appointments of the Commissioners by parliament, there was an up roar over the haste and lack of transparency that characterized the appointments and the parliament approval process. It thus, remains a matter of debate in Zambia whether the creation of the PHRC was a consistent step in line with the MMD's manifesto, or a donor driven public relations ploy to offset international criticism over the MMD's controversial record during the 1996 elections<sup>91</sup>.

Even though the establishment of the commission was hailed as an indication of the government's efforts to uphold democracy and the rule of law in the country<sup>92</sup>, it was viewed with a great deal of speculation by members of the opposition political parties and the civil society. This led to these groups to even decline the invitations from government to send their members to represent their interests on the commission and an illustration of this arises from the fact that government had difficulties in finding suitable persons to occupy certain positions on the commission as a number of people approached to take up then positions rejected the offers and an example of these was the then President of the Forum for Democratic Process (FODEP), Dr. Alfred. W. Chanda, a respected human rights

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<sup>90</sup> *Africa Watch, Protectors or Pretenders, 2001, NY*

<sup>91</sup> *ibid*

<sup>92</sup> *The Vice President Brigadier General Godfrey Miyanda: ZNBC Radio, Lusaka, 21 st March 1997, 1800GMT ( BBC Monitoring Services)*

expert, who was offered the post of Director. Another example is Dr. Michello Hansungule, another respected Zambian lawyer from the University of Lund, Sweden who rejected the offer of vice-chairperson of the commission<sup>93</sup>. In summing up these skepticisms, Dr Hansungule had this to say:

*“People do not accept that a government that violates human rights can stop doing so when told by its own arm. It is a genuine fear that needs to be addressed. Morally it does not make sense for a violator of human rights to set up an organ to supervise the manner in which this violator tries to comply with basic rights and freedoms.”*<sup>94</sup>

Even in the face of these skepticisms, the commissioners were sworn in on April 4, 1997 exactly three weeks before a pre-consultative group meeting of Zambia’s donors was to convene in London to critically examine among other things Zambia’s progress on political reforms following the elections. International ambivalence over rights conditions in the run up to the elections had resulted in a decision by the major donors to maintain an aid freeze<sup>95</sup>. Consequently, the pace at which process of appointing the commissioners was done raised suspicions that the setting up of the PHRC was just intended to placate donor concern about the human rights situation in the country in the hope of restoring aid flow.

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<sup>93</sup> Human Rights Watch/ Africa *The Reality Amidst Contradiction* JULY 1997, NY

<sup>94</sup> Dr Michello Hansungule. *On the Permanent Human Rights Commission: Afronet File, December 1997* at Pg 6

<sup>95</sup> Africa Watch, *Protector or Pretenders*, 2001, NY

## COMPOSITION, MANDATE AND POWERS OF THE PHRC

The composition of the PHRC as laid down in section 5 of the Permanent Human Rights Commission Act, is that it shall consist of the Chairperson, Vice-chairperson, and not more than five other commissioners.<sup>96</sup>

Furthermore, the mandate of the commissioners is laid down in section 9 (a-f) of the PHRC Act which provides that the function of the commission shall be:

- a) Investigate human rights violations*
- b) Investigate maladministration of justice*
- c) Propose effective measures to prevent human rights abuses*
- d) Visit persons and places of detention or related facilities with a view to assessing and inspecting conditions of the persons held in such places and make recommendations to redress existing problems*
- e) Establish a continuing programme of research, education, information and rehabilitation of victims of human rights abuses to enhance the respect and promotion of human rights and*
- f) Do all such things as are incidental or conducive to the attainment of the functions of the commission<sup>97</sup>*

In order for the commission to carry out its mandate section 10 of the PHRC Act enumerates the commission's powers which include: the power to investigate human right abuses on its own initiative or on receipt of a complaint or allegation under the Act by (i) an aggrieved party acting in such person's own interest; (ii)

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<sup>96</sup> *Permanent Human Rights Commission Act, Section 5*

<sup>97</sup> *Ibid section 9*

an association acting in the interest of its members; (iii) a person acting on behalf and in the interest of a group or class of persons. The commission is also empowered to summon or order the attendance of any person before it. It can also question any person in respect of any subject matter under investigation before the commission. Furthermore, the commission can require any person to disclose any information within such person's knowledge relevant to any investigation by the commission, and also recommend the punishment of any officer found by the commission to have perpetrated an abuse of human rights.

The commission also can when it considers it necessary recommend the release of a person from detention; recommend payment of compensation to a victim of human rights abuse or such victim's family. It can also recommend that an aggrieved person seek redress in a court of law<sup>98</sup>.

However, in spite of the authority given to the commission as highlighted above, there are quite a number of factors that serve to weaken the commission's ability of effectively fulfilling the objective for which it was set up for and it is from here that this chapter will now turn to look at some of the weaknesses of the commission.

## **WEAKNESSES OF THE PHRC**

### **(a)Funding**

The inadequate budget is a source of considerable concern for the PHRC. Since its inception, the government has not provided the PHRC with an adequate budget or facilities to undertake the mandated tasks. It is from here that in its Conclusions

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<sup>98</sup> *Ibid* section 1

and Recommendations of the Committee on Economic, Social and Cultural Rights of the United Nations, in concluding observation number 12 stated that:

*‘The committee notes with concern that the that the permanent human rights commission lacks human resources and budget allocation’*<sup>99</sup>

The committee further proceeded in its recommendation number 34 to state that:

*“The committee recommends that the state party (Zambia) ensures that adequate human and financial resources be allocated to the Permanent Human Rights Commission”*<sup>100</sup>

The PHRC receives an allocation in the government budget like all other government departments. However, this does not always mean that they actually receive the amount in cash which was budgeted for. On occasions they receive less, at times more. In 1997 for example the commission received ZK 200, 000, 000 (approximately 72 000 US Dollars) to meet its running costs. In 1999, ZK 781,000,000 (approximately 282,000 US Dollars) was allocated and given<sup>101</sup>.

It is apparent that the lack of adequate funding has seriously crippled the commission’s abilities to carry out its functions and an example of this was in 1997 when the commission announced that its probe into alleged Police gunfire during an opposition rally, injuring Dr Kenneth Kaunda and opposition Liberal Progressive Party Chairman Dr Rodger Chongwe in Kabwe, in August 1997, was ‘shelved’ because the commission had not raised the K65 Million (50,000 US Dollars) needed for the inquiry. This is clearly an anomaly in the protection pf

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<sup>99</sup> Committee on Economic, Social and Cultural Rights Zambia. UN. DOC. E/C

<sup>100</sup> Ibid recommendation number 34

<sup>101</sup><sup>101</sup> Human Rights Watch Protectors or Pretenders 2001, NY

constitutional guaranteed rights.<sup>102</sup> In bemoaning this lack of adequate funding, then PHRC Chairperson Justice Lombe Chibesakunda made the following observation:

*“The commission has not been able to implement its programme of work mainly due to financial constraints...( the commission) needs to be given reasonable allocations for start up and for its programmes and projects to be favorably funded to ensure that the institution does not collapse before it takes off”*<sup>103</sup>

Indeed the commission requires a great deal of funds to enable it pay its staff, travel to areas of human rights violations, undertake effective research and basically conduct all those activities necessary for the achievement of its mandate. The constraints outlined above have in fact been the reason on why some people have criticized the PHRC for being weak and ineffective. As an example, in the Times of Zambia of 10<sup>th</sup> June 1998 in its article titled ‘*Shamenda Prods Rights Commission*’, according to this article, the then Zambia Congress of Trade Unions (ZCTU) President Fackson Shamenda accused the commission of ignoring workers rights<sup>104</sup>.

Furthermore, in order for the commission to fulfill its mandate of promotion and protection of human rights, there is need to ensure that the PHRC is known by all sectors of society, particularly the vulnerable groups. It should create accessible procedures through which the commission can be accessed. However, facts prevailing on the ground are completely different. Thus, even though the

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<sup>102</sup> Human Rights Watch World Report on Zambia 1999

<sup>103</sup> Afronet Human Rights Report 1998 at pg 69

<sup>104</sup> Times of Zambia Newspaper of 10<sup>th</sup> June 1998

commission has provincial committees and that each province is allocated a commissioner to co-ordinate activities and to act as a link between the province and the commission, it is unclear what, if anything, the committees are doing. Members of the committees argue that as long as there is no financing for various identified activities, it is extremely difficult for the provincial committees to undertake any substantive projects.

#### **(b) Lack of Enforcement Powers**

Another major constraint that the commission faces is the lack of enforcement powers<sup>105</sup>. This situation derives from the fact that the PHRC Act gives the commission powers to make recommendations only, hence, the commission cannot of its own volition enforce its decisions or punish those it finds guilty of human rights violations. It is consequently clear that the lack of enforcement powers is a major impediment that hampers the commission's ability to do anything more than recommendation which in effect have little or no meaningful impact. An illustration of this was the commission's recommendation that the then Police chief Teddy Nondo and other Police officers be retired due to allegations of torturing the 1997 attempted coup detainees. What is particularly interesting about this case is that instead carrying out the commission's recommendations, the government went ahead and promoted him to the post of Deputy Commissioner in the Drug Enforcement Commission<sup>106</sup> and nothing was done with the other officers.

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<sup>105</sup> *Afronet File A Win Situation issue 4 December 1997 at pg 6*

<sup>106</sup> *Ibid 17*



Another example was in 1997 when the commission deemed unconstitutional and recommended the repeal of Regulation 12 of the Preservation of Public Security (1997), which prohibited restricted persons from communicating with the press or any groups not authorized by the Inspector General of Police. This recommendation like many others was ignored by the executive<sup>107</sup>. It emanates from the above examples that recommendations and decisions which the commission makes will remain solutions on paper unless there is political will on the part of the government to act on such decisions and recommendations and enforce them. Attached to this position is the fact that although the commission submits annual reports containing submissions to the President he is not bound by any provision of the PHRC Act to adopt and implement the recommendations of the commission.

It is in recognition of this weakness that 18 petitioners, including civil group societies submitted to the Mung'omba Constitutional Review Commission (CRC), that the PHRC should be strengthened and given powers to prosecute violators of human rights<sup>108</sup>. It is from here that the Mung'omba CRC observes that petitioners who made submissions on this subject were concerned that the PHRC was not effective in addressing violations of human rights because it did not have powers to prosecute violators of these rights<sup>109</sup>. Furthermore, the Mung'omba CRC, while recognizing that a national human rights institution such as the PHRC cannot adequately substitute for a properly functioning court system, is aware that the courts deal with all sought of legal problems, including issues of

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<sup>107</sup> *ibid*

<sup>108</sup> *Mung'omba CRC 2005 Pg 215*

<sup>109</sup> *ibid*

human rights and may therefore not adequately address issues of human rights. The Mung'omba CRC on the other hand, is focused on human rights issues, has a legitimate right to prosecute violations of human rights. Human rights issues are not issues that affect the individuals only, but are also matters of public interest. This being the case, there is need for a public institution to be responsible for prosecution of violations of human rights. Currently, in criminal matters, the office of the Director of Public Prosecution (DPP) protects the public interest by prosecuting criminal offenders. Similarly, the PHRC should be mandated to prosecute violations of human rights. It CRC) further observed that giving the PHRC powers to prosecute has the advantage of placing the process of prosecuting human rights violations in the hands of person's specialized in this field, instead of entrusting the responsibility to Public Prosecutors, who may lack the expertise<sup>110</sup>. It was in light of the above observations that the Mung'omba draft constitution proposes the vesting with the PHRC with the powers to prosecute cases of violation of human rights, subject to the DPP's authority.

It is in this view that Professor Anyangwe observes that under the South African Constitution, the commission has strong powers of enforcement. It may recommend change in any law that is not consistent with international human rights norms and standards. It further has wide ranging seizure powers as well as subpoena powers. It may institute court proceedings in its own name or on behalf of a person or a group or class of persons. It may also try to settle disputes arising from violations of human rights, by mediation, conciliation or negotiation<sup>111</sup>. It

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<sup>110</sup> *ibid*

<sup>111</sup> Professor Anyangwe Introduction to Human Rights and International Humanitarian Law 2004

can thus be seen that Zambia can indeed take a leaf from the South African position so as to enhance the effectiveness of the PHRC.

### **(c) Staffing and Appointment**

It is the position of this chapter that for any institution including the PHRC, to function properly, the degree of independence it enjoys is of great importance. Consequently, another weakness of the PHRC hinges heavily on its independence and this emanates from the appointment of staff and the earlier noted problem of funding. In relation to the former, it has been observed earlier in this chapter that the mode of appointment of staff has been an area of debate from the early days of the commission.

The commission consists of a Chair-person, Deputy Chairperson and five other commissioners appointed by the president. The appointments are then to be ratified by parliament. The tenure of office is three years which is renewable, subject to presidential and parliamentary approval. It goes without saying that this has the potential of seriously undermining the effectiveness of the commission as the presidential powers of appointment can be abused and further the check which is supposed to be provided by parliament has in the Zambian situation failed as parliament has always been one party dominated and has rarely questioned presidential appointments.

It is in this light that some petitioners to the Mung'omba CRC submitted that the civil society organizations, LAZ, and church organization should nominate commissioners to the PHRC in order for the composition to be broad based<sup>112</sup> and the CRC has proceeded to recommend that the mode of appointment and the

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<sup>112</sup> Mung'omba CRC Report Pg215

qualifications of the chairperson and vice chairperson should be enshrined in the constitution and that they should be appointed by the president on the recommendation on the recommendation of the Judicial Service Commission, subject to ratification by the National Assembly and as regards other commissioners, they should be appointed by the President and ratified by Parliament upon nomination by human rights organizations identified by the president. The above position of the CRC stems from the fact that if the PHRC is to effectively carry out its mandate, it should be independent and one way of achieving this independence is through the appointing process of members of staff.

## CONCLUSION

Bearing in mind the vital role that PHRC plays in safeguarding human rights, this chapter has strived to highlight the background, composition, powers and finally the weaknesses of the PHRC with the aim that the identification of some of the weaknesses will help in the reforming and consequently increase the effectiveness of the PHRC in its mandated task of protection and promotion of human rights.

## **CHAPTER SIX: CONCLUSIONS AND RECOMMENDATIONS**

### **CONCLUSIONS**

#### **Chapter One**

The first chapter has outlined the historical background of the Zambian Bill of Rights. In the some chapter, it was further brought out that the conception of human rights as limitations on the sovereign culminated in the international protection of these rights and it is for this reason that even at international level, there is the International Bill of Rights consisting of the United Nations Charter, the 1948 Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR) and its optional Protocol.

It was further shown this chapter that even though Zambia has undergone many constitutional changes since independence, the content of the Bill of Rights has remained the same from the time the Bill of Rights was introduced in the 1963 Constitution to date.

#### **Chapter Two**

Chapter two looked at the first notable inadequacy of the Zambian Bill of Rights and this emanates from the narrow category of rights it protects. This position emanates from the fact that the Bill of Rights largely covers Civil and Political Rights, whilst, economic, social and cultural rights are notably absent. It was further brought out in this chapter,

that this is a serious anomaly considering the fact that all rights are considered to be equally necessary in ensuring dignity and peace for the individual, thus, these rights are in essence, indivisible and interdependent.

This chapter further highlighted that even though economic, social and cultural rights are provided for in Part IX of the constitution, they have a non justiciable character. This position was contrasted to other jurisdictions in the region which give these rights a justiciable character and as examples the constitutions of Malawi and South Africa were looked at.

### **Chapter Three**

In this chapter, the second noted inadequacy of the Zambian Bill of Rights was looked at and this weakness emanates from the wide limitation or 'claw back' clauses that characterize the Zambian Bill of Rights. It has been seen that a right is given on one hand, but due to the wide limitations placed on these rights, there is the actual effect of these rights being taken away by the other hand. It was noted that among the rights that have wide claw back clauses are the right to life, protection of privacy of home and other property and the protection of the freedom of expression.

This chapter further brought out the fact that some rights can be suspended during times of war or declaration of states of emergency. It further argued that due to lack of proper safeguards in the constitution to deal with the power to declare war or states of emergencies, this authority has in some instances been abused, hence, causing gross violations of guaranteed rights.

## **Chapter Four**

This chapter looked at the gender biased language employed in the drafting of the constitution in general and the Bill of Rights in particular. This emanates from the continuous use of the masculine term 'him or his' to refer to individuals protected by these rights. Even though this may seem trivial, it was shown in this chapter that it is a folly that a part of the constitution which guarantees equality before the law and strives to protect individual rights should continue to be drafted in a gender biased language. Thus, this chapter highlighted the fact that Zambia being a signatory to the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) should take all necessary steps to eliminate discrimination in all its forms and this includes the replacing of gender biased language on our statutes.

## **Chapter Five**

Chapter five looked at an institution though not provided for in the Bill of Rights, plays a vital role in the protection of the guaranteed rights and this body is the Permanent Human rights Commission (PHRC) of Zambia. This was done by looking at its background, composition, mandate and powers and finally its weaknesses.

It was further shown by this chapter that the implementation of human rights norms and standards at national level requires practical measures and one such measure is the establishment of a national human rights commission charged with human rights monitoring, promotion and protection.

## RECOMMENDATIONS

- (1) This chapter recommends the widening of the scope of guaranteed rights to cover not only civil and political rights but also economic, social and cultural rights. The basis for this recommendation lies in the fact that in today's world all rights are basically considered to be equally necessary in ensuring dignity and peace for the individual and that these rights are in essence indivisible and interdependent.
- (2) 'Directive Principles of State Policy' found in Part IX of the constitution should be given a justiciable character. Under the current position, even though economic, social and cultural rights are mentioned in Part IX of the constitution, they are however non justiciable as a citizen cannot commence an action against the government on the ground that his or her right to education, health care, employment, social security and shelter among other things have been violated.
- (3) There should be a reduction on the number of limitation clauses on guaranteed rights, but instead there should be one clause of general application permitting limitations to fundamental rights and freedoms and this law should not negate the essential content of the rights or freedoms in question.
- (4) Every person must have a right not to be discriminated against either directly or indirectly on any grounds including sex, race, color, or age. Thus, it is recommended by this chapter that there is no need for the Bill of Rights to continue being drafted in a gender biased language, thus, as a signatory to international instruments such as the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), there is need to get rid of all practices that are discriminatory.



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(5) It is the recommendation of this chapter that in order to make the Permanent Human Rights Commission (PHRC), more effective and efficient, there is need to have its core functions clearly spelt out in the constitution.

It is further recommended that for the PHRC to be more effective in the monitoring, promotion and protection of human rights, increased funding to the commission is required.

Finally, it is the recommendation of this chapter, that instead of just being vested with powers to recommend alone, the PHRC should be vested with powers to prosecute cases of human rights violations subject to the Director of Public Prosecution's authority.

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