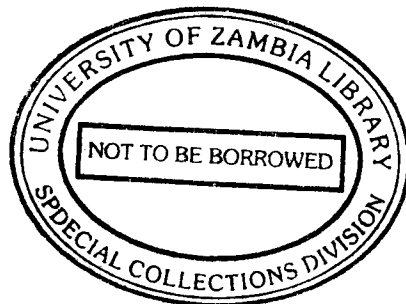




SCHOOL OF LAW



I recommend that the obligatory Essay prepared under my supervision

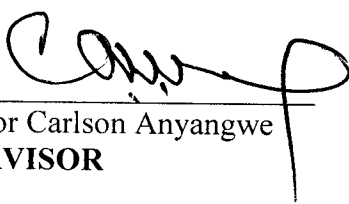
By

Ngande M. Mwanajiti

Entitled

Human Right Protection in Zambia: Reality or Fallacy?

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

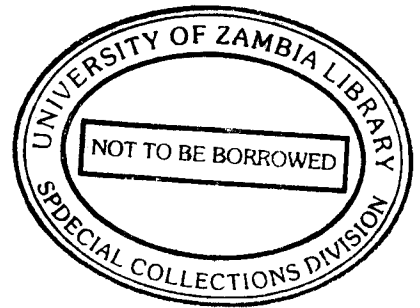

Professor Carlson Anyangwe
SUPERVISOR

24/1/06
DATE

HUMAN RIGHTS PROTECTION IN ZAMBIA: REALITY OR FALLACY?

By

Ngande M. Mwanajiti
(Computer Number 99341760)



A directed research paper submitted to the University of Zambia Law faculty in partial fulfillment of the requirements for the award of the degree of Bachelor of Laws (LLB)

UNZA

DECEMBER 2005

DEDICATION

To those who have suffered pain, anguish and betray at the hands of fellow human beings. The struggle for justice is unending and must be pursued with vigor.

ACKNOWLEDGMENT

Many people have helped in my efforts to obtain an LLB degree from the University of Zambia. The support staff in the Law School have been as useful as all my Lecturers in all the years.

This essay has benefited immensely from Professor Carlson Anyangwe, who has guided me meticulously and drawn my attention to fundamentals of the study of law. He has been particularly instrumental in broadening my appreciation of the legal discipline.

My appreciation also go to the Dean, Professor A.W. Chanda, who has been very accommodating. Equally, I wish to make mention of the special encouragement from the Course Coordinator, Mr. Mumba Mallila, who has remained the man that I have known for many years.

It would have been difficult to complete this work without the support and encouragement of my family. My wife, daughter and son have simply been wonderful.

I alone, is responsible for any errors or omissions in this essay.

CHAPTER FOUR: <i>The Zambian Courts: Protectors or Pretenders</i>.....	31
Overview.....	31
The Judiciary.....	32
Judges.....	34
Social Background of Zambian Judges.....	38
Access to Courts.....	38
Conclusion.....	40
CHAPTER FIVE: <i>A complex legal regime</i>	41
Overview.....	41
A commentary on the bill of rights.....	42
A commentary on Case Law.....	43
Conclusion.....	45
CHAPTER SIX: <i>Conclusion and recommendations</i>	46
Summary	46
Interpretation	46
Suggestions and Recommendations	46
Bibliography	48

CHAPTER ONE

The Imperial Jacket & Post Colonial era

Overview

Present Zambia, is a product of British imperialism. The British colonised the territory now known as Zambia in the first quarter of the 20th century. The rationale for colonisation, is well documented elsewhere, but for our purposes, it is enough to state the fact of furthering British interest, at the height of industrialisation in Europe. In this respect, it may be argued that in essence the whole exercise of colonisation, in the aftermath of the 1884-85 Berlin conference, was not part of the initial design of the construction of Europe at Westphalia, but rather an accident of economic necessity of expansion, which saw the exportation of draconian laws and practices from Europe to Africa.

Zambia's architectural foundation is thus anchored on imperialism, with all its vices. Imperialism is defined as "rule by emperor or the policy or principle of having and extending control over the territory of other nations, or extending one's country's influence through trade and diplomacy"¹

The above definition by implication leads to the question of how any such country seeks control of another. We will restrict ourselves to Zambia, wherein control may be traced to missionaries, such as David Livingstone. Available evidence suggests that Livingstone, and others like him, were on an evangelical mission, to turn the 'heathen' Africans from ungodly and allegedly barbaric acts, to the Christian way of life as expounded by the holy Bible. While there is no evidence to suggest that Livingstone and others were agents of the British government, it is not in dispute that the British government, used the information obtained by such missionaries to develop their grand scheme of colonisation.

¹ Robert Allen (ed) Chambers encyclopaedic English dictionary, Larousse, Edinburgh, 1994

British imperialism

So from a historical perspective, it is inarguable that the first entry was by the men of the Bible, just before the agents of the formalisation of British colonialism. The British South African Company, a company granted a royal charter in 1889, was responsible for the affairs of North Western and North-Eastern Rhodesia, after successfully gaining the territory over other competing interests. The prime mover was the company's Chief Executive Cecil Rhodes, who had a dream of constructing a rail line from Cape to Cairo. Essentially, Northern Rhodesia, as it then was, was acquired by Cecil Rhodes and his British South African Company, and to this "achievement", a Senior Colonial administrator commended Rhodes in the following captive terms:

"The Foreign Office and the Colonial Office then and now entertained much the same ideas that you and me entertained much the same ideas that you and I held about the necessity of extending the British Empire within reasonable limits over countries not yet taken up by other European powers, to provide new markets for our manufacturers and afford further scope for British enterprise...when the Government, though wishing to save this country from the Portuguese and the Germans and secure it for England, yet had not a penny to spend on it, you stepped forward and said 'Make this extension of British supremacy, and I will find the money to administer the new territories'²."

But how was British rule effectively brought about? First, we need to acknowledge the fact that international law, as was known then, permitted such conduct³, which in today's era, would invite serious controversy, notwithstanding the current belligerent United States and British adventurism in Iraq⁴. In fact celebrated as the Universal Declaration of Human Rights is, one of its main weaknesses is that during the negotiations, which probably explains the manner of adoption, and existing attitudes, the key promoters of the Charter had a litany of gross human rights violations in their backyards:

"The Soviet Union had its Gulag, the United States its de jure racial discrimination, France and Britain their colonial empires. Given their vulnerability as far as human rights were concerned, it was not in the political interest of these countries to draft a

² Letter from Johnston to Rhodes, 8th October, 1893, Foreign Office 2.55, cited in Meebelo H. Reaction to Colonialism: a prelude to the politics of independence in Northern Rhodesia 1893-1939, Manchester University Press, 1971, P 17

³ 1884-85 Berlin Conference on the partitioning of Africa

⁴ Britain and the United States of America have occupied Iraq after an invasion, which UN Secretary General Kofi Annan has classified as illegal, in conformity with Article 2 of the UN Charter.

Charter that established an effective international system for protection of human rights.⁵”

So, it is clear that the atmosphere then allowed for the conquest of other territories for purely selfish gain by European powers. The absence of any mechanism to repel such manoeuvres, simply meant that the powerful as often happens, would have their way.

Second, it is not unreasonable to argue that human rights, in this context, were not meant to be of any application to Africans and other races regarded as inferior, apart from the white race. Our support for this observation arises out of the preamble of the Universal Declaration of Human Rights, which frowns upon inhuman treatment. The act of signing the historic document, was on 10th December 1948, during which time all Africa South of the Sahara, was under colonial bondage. From 1948, it took another forty-six (46) years before the last of Africa’s oppressed colonies, was emancipated, albeit, not willingly!

The Colonial structures

We now briefly discuss how the colonial structures were imposed in the then British colony of Northern Rhodesia. Again, we note that this relationship, involved the British government. By convention, the British government has over the years developed a highly sophisticated method of dealing with it’s administration. At the time, and without shame, there existed a Colonial Office in London, with the sole responsibility of governing the overseas colonies. Ordinances and decrees, including judgments of the Privy Council governed territories like Zambia, from a distance. In the early colonial matrix, there was no room for the participation of Africans and as such they (Africans) were “strangers”, subject to control and manipulation.

Implementation or enforcement of colonial decisions, was the preserve of the local representative of the Crown, in the name of Governor, whose omnipotent powers were beyond question and only review able, in England. What this effectively meant, is that overtime, there was, a transplantation of the English legal system, for the smooth

⁵ Buergenthal T. International Human Rights in a Nutshell, West Group, 1995, P22

functioning of the colonial authorities. The legal transplant, confirmed by no other than Lord Denning in the case of *Nyali V Attorney General*, was clearly never meant for any other purposes than the convenience of the colonisers. In this case, of a dispute that had a Kenyan *situs*, the Learned Judge argued that the common law cannot be applied elsewhere with the same measure of accuracy as in England.

Officially, Zambia, was a protectorate and not a colony. But that fact aside, there is nothing to suggest that the British would have, by themselves voluntarily relinquished control over Northern Rhodesia, if it were not for the demands made by Nationalist leaders. We want to argue that without any such agitation, Zambia, would not have been born, notwithstanding that the settlers only numbered⁶ 70,000 as against 3,000,000, natives. The enactment of the Public Order Act in 1958, is sufficient evidence of the British intention of subjugating natives, using draconian laws. The aborted Federation of the two Rhodesias and Nyasaland, speaks volumes of the fact that the British had their own design, which design, was tailored to serve the interests of the settler population. However, there is evidence of the British government's desire to pull out of Northern Rhodesia. But, such moves had to contend with several dynamics such as the settler's demand for self-government to the exclusion of natives. The strong reaction of settlers to the Passfield memorandum⁷, which extended the doctrine of paramountcy to Northern Rhodesia, is good evidence of the Settler truancy and lack of concern for the invaded population.

Racism and discrimination

⁶ Mulford D C. Zambia: The politics of independence 1957-1964, Oxford University Press, 1967, P1

⁷ Cited by Mulford D C. Zambia: The politics of independence 1957-64, Oxford University Press, 1967, P

Discrimination, hate and cruelty, remained major problems perpetrated by settlers and the colonial administration in general. One Rev. Mushindo, a victim of the BSA company, describes this phenomena in the following graphic and sad detail:

“ The people were treated like slaves, and very often they would not be allowed to enter Native (or District) Commissioner’s offices with their shoes on. The African messengers who were the Administration’s employees also treated their own people with the same callousness as the white officials.

When tax defaulters were apprehended, they were more often than not, confined in a hut in which a big fire was made, producing a lot of smoke, while the door was closed. This was one form of punishment for the defaulters. While on tour, a white official sometimes rode a bicycle while an [African] attendant ran after him to carry the bicycle at points where the official was unable to ride it. ...had to carry his master’s provisions for the day. Any remains of such provisions, were given to the official’s dog, and not to the attendant, however hungry the latter may have been⁸”

A further vindication of the hypocrisy of racist settlers, is discrimination, based on colour. It was the official policy to segregate. For purposes of illustration, apartheid South Africa, represents the most refined colour bar method devised, where each major town/city has a corresponding squatter settlement inhabited by non-whites meant to provide cheap labour. Changes in demographics forced the racist regime to come up with the concept of Bantustans, which were the “official countries” of native South Africans. It is important to note that although Bantustans did not have international acceptance, friends of the racist regime, accepted travel documents from these creations of the apartheid machinery.

Quite clearly, one is able to discern a pattern of double standards, as it relates to human rights, which is the very reason why the human rights struggle has become so fickle. Nelson Mandela, remains a perfect example of a man jailed for life, for a right cause, but which cause was only a preserve of whites. But that aside, the same whites called him a terrorist, banished him in prison for 27 years and now treat him with revelling respect. Whether this is pretence or convenience, is beyond the scope of this discussion. But what ever it is, it represents the highest form of hypocrisy.

⁸ Meebelo H S. Reaction to Colonialism: A prelude to the politics of independence in Northern Zambia, 1893-1939, Manchester University Press, 1971 P. 94

There was an impressive pattern of resistance against colonial subjugation. This fact, is a clear indication that human rights are universal and more important is the fact that the intrusiveness of the white settlers, had never been welcome. Rights are inherent, inalienable, indivisible and any person who feels injured, will to the extent of possibility, claim their rights. The independence struggle was about expressing this feeling in a concrete manner. The maltreatment of blacks was so vicious that it aroused a clear sense of belonging and unity among the oppressed. The struggle witnessed in Northern Rhodesia and most Africa in particular, was violent and matched the violence that the colonialists had continuously unleashed on indigenous people. To the extent that resistance could no longer be contained, and took its own course; confirms the fallacy of associating human rights with the West. The struggle for independence was about dignity and self-determination. Though called something else, it was a human rights struggle, with a local dimension, and corresponding with the preamble of the Universal Declaration of Human Rights, cited above.

Post-independence

So what happened after the struggle for independence? One thing clear is that the natives had been brutalised. They could no longer put up with any kind of oppression. Having attained political emancipation, the next struggle, begun. Independence, was given to Zambians on the basis of the 1964 Lancaster independence constitution. The post independence leadership, showed serious signs of intolerance with imperatives of governance, when President Kaunda attacked Chief Justice Skinner⁹ in 1969 after a judicial pronouncement, which Kaunda thought was in bad taste.

The inherited State of Emergency, whose foundation was questioned by the Munyama Human Rights Commission, (to be discussed later) remained in operation even after independence. The State of Emergency, dimmed all hope of reforming colonial constructs, in particular police brutality. In fact, the focus shifted towards securing

⁹ Nwabueze B.O. Judicialism in Commonwealth Africa, St. Martin's Press. New York, 1977, P. 278

Kenneth Kaunda's hold on power. The cases of *Nkumbula Vs Attorney General*¹⁰, where the plaintiff sought to challenge the introduction of the One Party State, *Chipango V Attorney General*¹¹, which both challenged the legality of detention, are instrumental, in understanding the insidious nature of power founded on the colonial super-structure. The 1972 One-Party State Constitution, was self serving and failed to uphold basic human rights. In this architectural design, the Party was supreme over all organs of state! An examination of the design of this constitution suggests that it is the political elite, professionals and intellectuals, that complicated the quest for a holistic respect for human rights.

Locating human rights

We now need to deal with the misplaced assumption that human rights are a western import. As the wording goes, the emphasis is on **human**. For purposes of emphasis and from a conceptual stand-point, we quote from an Afronet/Interights publication, that looks at the universality of human rights:

“ The basic concept of human rights as a claim to which all people are entitled as of right by virtue of their humanity firmly locates these rights and their implementation in the social and political realm of human affairs. What ever these rights are, their implementation will necessarily require collective and sustained efforts that require the allocation of resources over an extended period of time. The realisation of human rights also presupposes the existence of an authority that can mediate in case of conflict and adjudicate the competing demands of claimants of rights. Therefore, the basic concept of human rights can only be realised through some form of wide-scale political organisation that is capable and willing to undertake these functions¹²”

In the context of this Chapter, it cannot by any measure be canvassed that the colonial regime, was in a position to adjudicate over competing interests. As a matter of fact the crisis brought about by the Passifield Memorandum, demonstrates the point very well.

¹⁰ [1972] Z.R. 204

¹² An=Na'im A.A (ed) Universal Rights, Local Remedies: implementing human rights in the Legal Systems of Africa, INTERIGHTS/AFRONET/GTZ, 1999.P.8

The misplaced argument is that Human Rights are a western concept. If that were to be the case, what then would be the classification of the nationalist struggle in Zambia and Africa as whole? If anything, what the postulation of origin succeeds to do, is to cast doubt and probably pour scorn on the deliberations that lead to the morally powerful Universal Declaration of Human Rights. As we have seen above, at the time of negotiations for the Declaration, blatant human rights violations affected Africans and black people without exception, implying that at the time, the definition of HUMAN, was restricted to the white race and quite frankly, if that were to be the case, a terrible absurdity, would have been created, out of what is sometimes referred to a superiority complex, with absolutely no value to humanity.

Conclusion

We conclude the chapter by looking at the role that the political elite has played in Zambia, to advance law development and society in general.

It should be made clear from the beginning that a role, may be well executed or indeed badly executed. It is not our intention to be judgemental, but rather, our approach will disguise intention by restricting ourselves to notorious facts, as relates the subject matter.

The fact of Zambia's colonial legacy is acknowledged. Clearly as discussed above, the colonial framework was intended to serve very specific purposes, which purposes were diametrically opposed to that of Zambians. For instance, Cecil Rhodes, did not hide his intention of expanding British dominion for economic benefit. That becomes a distinct paradigm which cannot possibly be in tandem with imperatives of building a new nation, in the aftermath of colonisation.

So, what happened immediately after 24th October 1964? Did the new government plan on instituting a fundamental paradigm shift, which shift would be in synch with the variables and demands of a new nation?

To respond to the above, we shall apply an objective test and look at Zambia's legal framework thereafter. The reason for picking the Legal System, is simply that Zambia, is said to be founded on the rule of law, meaning that every government action or decision, must be supported by legislation. The type/kind of laws that are in operation, will to a large extent determine what kind of society evolves.

By the Act of Extension, British laws, from August 17 1911 apply in Zambia to the extent permitted by domestic law. A fact beyond contention is that Zambia has simply uplifted colonial legislation and replaced "offensive words" to ensure political correctness. The Word "CROWN" has been replaced with STATE. For example, the Crown proceedings Act of the United Kingdom, is now refereed to as the State Proceedings Act.

Because of its importance it needs to be mentioned also that in Zambia, Judicial Review, is based on Order 53 of the Supreme Court of England. This is permitted by Zambian legislation and the unsettling effect is a consequence of such an architectural design.

Zambia's constitutional regime has remained unstable. About four commissions have been appointed to inquire on what type of laws the country needs. So far, the results have been far from satisfactory making serious content based analysis, rather difficult. The constitutional instability, which is a matter of fact, has consequences for politics of the country.

We submit that part of the problem is the fact that in 1972, the Zambian political leadership, opted to undertake a very costly political experiment of the One Party system. Under this system, governance became a very thorny issues as demonstrated by so many detention cases, which we shall discuss latter. To the extent that during the One Party State, the party in power – the United National Independence Party (UNIP) was supreme over all government institutions, it can be suggested that UNIP, as the Party in charge of state affairs, failed to set the country on an irreversible path to a functional democracy.

The governance credentials of the One Party state have remained as controversial as the decision to introduce a One party state.

CHAPTER TWO

Zambia's Commitment to Human Rights

Overview

Zambia's assertion to being a democratic state, which places premium on human rights, comes into question in this chapter. A democracy is defined variously, but at the very least there is consensus on what constitutes the term. Briefly, it is a form of government that assures participation, and in modern times, through elected representatives, who govern on the basis of a mandate obtained through periodic elections. Since we seek to interrogate Zambia's commitment to international human rights standards, we will anchor our interrogation on the concept of participation, which in our view, is a good index for measuring the claims that government makes, as regards its commitments.

It is also opportune to cast the net wider, and understand the context and parameters within which the Zambian government has committed to various international legal instruments. For these, compliance is the most objective measure that will guide the discussion. We must state here that the undertaking of an international obligation such as a treaty, is voluntary. Of course, it could be argued that there is some aspect of coercion, to the extent that international law principles are at play, in so far as a state would not be expected to be antagonistic towards, the *Universal Declaration of Human Rights* for instance, which though without express legal authority is clothed with moral authority, such that denial has consequences. Besides, the United Nations Charter, places such status on the UN and its work. The Charter itself is regarded as a Constitution for the World Community. In fact, "the United Nations' distinctive mark is its comprehensive scope of duties, especially the maintenance of international peace and security and its orientation towards international public welfare"¹³ Subject to practical limitations, Article 38 .1 of the International Court of Justice Statutes, places the Court, in a position where it has both moral and legal effect upon states, by the words " The court, whose function is

¹³ Bruno Simma, The Charter of the United Nations: a commentary, Oxford University Press, Oxford, 1995, P.27

to decide in accordance with international law such disputes as are submitted to it, shall apply ... and then goes on to make a general qualifier in (c) reading as thus: “ the general principles of law recognized by civilized nations”¹⁴

Zambia has signed and ratified the major human rights legal instruments. From this stand point, its ranking may be said to be good. However, there is no evidence, going by domestic legislation, suggesting that there is strict compliance with these instruments. In fact, it can be argued that, the fact of signing and ratifying in the face of Zambia being a dualist state, has become an excuse for abrogating international treaty obligations, particularly that domestic legislation is permissive of violations. Article 25, is embedded in part III, of the Constitution and expressly, as we shall see later, makes provision for derogations, based on subjective decisions.

Political participation

To understand Zambia’s commitment to human rights, a cursory review of the concept of participation, in the immediate post independence era, is useful, having located the country as one, among members of the international community. Sidney Verba offers a hypothesis regarding political participation in the following terms:

“ The way in which demands for political participation are met plays a major role in the development of attitudes, towards participation and integration. If... groups demanding a voice in politics are welcomed by those who hold political power, the integration of the political system is likely to be maintained. The nature of the response of the incumbent political elites to the demands of ... groups for participation in the political process will affect the way in which these groups view their role as actors in the political system. If the participatory demands of ... groups are accepted as legitimate by incumbent elites, the ... groups are more likely to ...focus upon the attainment of relatively limited and practical goals. If barred from participation, the habit of compromise in the name of the achievement of the possible will not develop...One will focus on distant...goals which even if unattainable [in the short run] will be more psychologically rewarding than smaller more practical goals which, since they too are unattainable due to lack of influence over the government will appear petty and trivial”¹⁵

¹⁴ United Nations, ICJ Statutes, NY, NY.

¹⁵ Sidney Verba cited in Ollawa P. Participatory Democracy in Zambia: The political economy of national development, Arthur H. Stockwell Ltd, Devon, 1979 P.99

The citation above, captures the dynamics in the pre and post independence Zambia. In Chapter one, we have made mention of the practical effects of colonialism, which remained defiant to popular participation, as evidenced in the enactment of the Public Order Act and documented instances of exploitation and contradictions of British imperial policies during the administration of the BSA in the period between 1954 and 1960¹⁶.

Post independence Zambia, inherited institutions that reflect imperial Britain. While the consequences require elaboration, space denies us that opportunity, except to make mention of the dilemma the new leadership found itself. In tracing the origins of the One Party State, Cherry Gertzel and others, observe that:

“ Nevertheless, in 1964 a sense of great optimism and abundance pervaded society, and Zambians at all levels had great expectations of independence¹⁷ In fact and in more precise terms, the situation has been captured as follows: After a colonialism characterized by intense racial discrimination, development was defined not only in terms of societal change for the community, but also of increased opportunities for the individual. The ordinary Zambian expected that life for him and his family must become better, while those who had fought in the nationalist struggle expected that their political role would be rewarded¹⁸.”

A fundamental question that arises out of the above analysis, which we associate ourselves with, is whether indeed, there was a real paradigm shift, away from the colonial establishments, to respond to the demands and dictates of a society, emerging from strife. We think not. While attempts at evolving a value system through ideas such as humanism, cannot be ignored, the failure to discover and embrace a coherent ideology, may explain the failure in presenting a flawless paradigm shift. Scholars, have described Humanism as utopia, by the very fact of its inherent contradictions and variance with

¹⁶ Sikotaped Wina, Articles in Zambia Daily Mail, issues of Nov. 16, 30, and December 7, 14 and 16. Lusaka, 1977 cited in A W Chanda, Phd thesis

¹⁷ Kenneth Kaunda, Speech at Chifubu Rally on the Copperbelt, 17th January 1965 (also in Zambia: Independence and beyond – Speeches of Kenneth Kaunda, Thomas Nelson and Sons, London, 1966)

¹⁸ Gertzel Cherry (ed) The dynamics of the One-Party State in Zambia, Manchester University Press, Manchester, 1984 P.5

reality. The ambiguity is demonstrated by the fact that: “while exploitation of man by man was condemned as inimical to Humanism precept and practice, there was no definition of what constituted exploitation”¹⁹ For avoidance of doubt, President Kaunda propagated his philosophy as follows:

*“ Whatever is being performed, be it in the political, economic, social, cultural, religious, scientific or technological fields, Man must be central in all that we decide to do in both word and deed. This is a challenge, and Zambia is committed to doing everything possible to meet it ”*²⁰

We have made reference to Kaunda’s Humanism, because it sought to establish a set of societal values by which a world outlook or ideological posture would enable us appreciate Zambia’s conception and understanding of human rights, both as a doctrine and in practice. So far, Kaunda argues that in his thoughts, man is at the center of everything. In other words, literally understood, nothing is to be done which denigrates humankind. If anything is to be done to man, there should be a rigorous and definitive regime of guidelines, protecting against pain and any dehumanizing action.

We have for purposes of contrast, refereed to the spirit of the United Nations Charter. While Zambia was not in existence in 1945, the ease with which the country acceded to the Charter and other international legal instruments, negotiated by the colonial authorities, is understandable.

Kaunda’s ideology of humanism hits a code with the preamble of the Universal Declaration of Human Rights, as contained in part, which reads that:

“ Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people ...Whereas it is essential, if man is not to be compelled

¹⁹ Ibid P.10

²⁰ Kenneth Kaunda, Humanism Part II, Neczam, Lusaka, P XII

*to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law*²¹”

So, assuming that the proponents of Humanism believed in their ideology and lived by it, it is fair to conclude that Zambia would have had one of the most respected human rights records, worthy emulating. The problems of participation arising out of political imperatives, such as the struggle for Party supremacy,²² presents a picture that doubts Zambia’s commitment to the observance of human rights. There is more rhetoric, than deed, as we shall discuss in Chapter three.

We should mention at this stage that Zambia’s independence Constitution had a bill of rights, which protected fundamental rights. It was as a design of the famous Lancaster House post-colonial constitutions, designed by the British and handed over to the new nation. There is a bias towards the presidential system practiced by the United States of America. From the presidential system, a feel of the doctrine of separation of power, is discernible in the three wings of government. The One Party system discussed briefly in Chapter One, whether by design or not, had the effect of compromising²³ institutions of government, as the party became supreme over all institutions. Separation of power was greatly diminished. The Chona²⁴ Commission of inquiry, appointed to realize the institutionalization of the One Party state, was a blow to liberty as may be seen in the landmark case of *Nkumbula Vs Attorney General*²⁵, where the appellant sought to invoke Article 28 of the constitution, based on fears of the introduction of a One party State. In its ruling the Court took a technical view and dismissed the application on the ground that it was improperly before the court since no executive or administrative action had been taken in relation to the appellant. Nkubulula’s fears, came to pass!

²¹ United Nations, Universal Declaration of Human Rights, NY, NY, 1948

²² Kenneth Kaunda, “Watershed Speech” Speech delivered to the National Council of the United National Independence Party, 1975

²³ Zimba L PhD dissertation, University of London

²⁴ Government of the Republic of Zambia, Chona Commission of Inquiry on the desirability of establishing a One Party State in Zambia, Lusaka, 1972

²⁵ [1972] Z.R.204

As an unavoidable measure of containing dissent, the Chona Commission, produced a constitution that had little regard for human rights. This was particularly provided by the amendment, where Article four, specifically provided for only one party, namely the United National Independence Party.

The half-hearted bill of rights, is so loud in demonstrating a void of commitment by government, as it relates to the legal protection of human rights. In fact, the gap occasioned by the ineffective bill of rights in the One Party Zambia, was compounded by the existence of a State of Emergency, inherited from the frustrated colonial administration. The fact that the State of Emergency only terminated in 1991, casts serious doubt on the commitment of the Zambian government towards respect for human rights.

The post 1991 administration, which had spearheaded the struggle for a return to multi-party politics, appeared geared to put the country on a serious path of development premised on democratic norms, values and practice. In fact, the Movement for Multi-Party Democracy (MMD) campaigned partly on the need to free Zambia from the jaws of the monstrous One Party State, under UNIP. Freedoms such as Expression, Assembly and Association, were all seen as preserves of the One Party officials, and as such needed to be done away with. The dicta, by Ngulube CJ in *Mulundika and seven others V Attorney General*²⁶, as it relates to the position of the courts on democracy, is instrumental in two ways: First, that the judgment involved the MMD, whose core value is supposed to be democracy and second, an indication of how government views individual liberties. The fact that the government of the day went back to Parliament (with an amendment bill), essentially to undermine the Court decision, shows how unprepared the Executive has been in managing civil liberties.

²⁶ The United National Independence Party held a rally without a Police Permit. The Police broke up the rally and threatened UNIP cadres with arrest. The Trial Judge in the High Court found for the State, but on appeal and upon closer examination of part III of the Constitution, the Supreme Court struck down parts of the Public Order Act which were held to be ultra-vires the Constitution and directed the Inspector General to draw guidelines for public rallies. The Executive reacted angrily and went to parliament to water down the ruling of the Supreme Court. In a judgement delivered by Ngulube CJ as he was then, he spoke strongly in favour of a democratic order.

Revisiting the State of Emergency

It is critical to underline the fact that the State of Emergency, was in place as long as Kaunda was in power, and there are various scholars, who have attempted to justify the existence of such draconian laws. One eminent scholar and African nationalist is former Tanzanian President, the late Dr. Julius K. Nyerere, who defended his country's Preventive Detention Act, and argued that:

“ Our Union has neither a long tradition of nation hood , nor the strong physical means of national unity which older countries take for granted. Until the vast mass of the people give full and active support to the country and its Government, a handful of individuals can still put our nation into jeopardy and reduce to ashes the efforts of millions²⁷”

In Zambia, it was argued that the “Executive needed to be armed with wide discretionary powers in order to organize resistance to these subversive onslaughts against her and to serve her economy from disruption by the hostile neighbors.²⁸” Dr.imba, as he then was, sums it succinctly and notes “ the country needed to secure itself a united and vigilant population under the guidance of a one party and strong executive²⁹”

The Zambian Courts have acknowledged the far-reaching detention powers, in the case of *Kapwepwe V Attorney General*³⁰, where the obiter of Baron J, though chilling, appears as follows:

“ It must be stressed that the President has been given power by Parliament to detain persons who are not even thought to have engaged in activities prejudicial to security or public order, but who, perhaps because of their known associates or for some other reason, the President believes it would be dangerous not to detain...³¹”

We here submit that the State of Emergency and other subsequent initiatives, such as Kaunda's Humanism and the controversial declaration of Zambia as a Christian nation,

²⁷ Nyerere J. “Speech inaugurating the University College of Dar-es-Salaam”, in Review of Contemporary Law (1964) P.11.

²⁸ Himwiinga P.A. Emergency Powers in Zambia, LLM Thesis, University of Zambia, Lusaka, 1985, P.9

²⁹imba L. The Constitutional Protection of Fundamental Rights and Freedoms in Zambia: A Historical and Comperative Study, University of London, 1969

³⁰ [1972] Z.R 248

³¹ [1972] Z.L.R 248 as per Baron J

are at variance with the legal protection of human rights, for the simple reason that the law has at best remained vague and incapable of protecting people's rights. Our reference to the State of Emergence is to simply highlight how, the state, has used Emergence Powers to violate human rights since under such powers, and as reflected in Article 25. Here, the State is permitted to derogate provisions of Articles, 13, 16, 17, 19, 20, 21, 22, 23 or 24. In fact, we need to reproduce Article 25, to show the absurdity of any claim to respecting human rights, under a State of Emergence:

“ Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of Articles 13, 16, 17, 19, 20, 21, 22, 23 or 24 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 purposes 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 question³²”

To this, Julius Nyerere, observed that in practical terms, this means that:

“ you are imprisoning a man for when he has not broken any written law, when you cannot be sure of proving beyond reasonable doubt he has done so. You are restricting his liberty, and making him suffer materially and spiritually for what you think he intends to do, or what you believe he has done Few things are more dangerous to the freedom of a society than that. For freedom is indivisible and with such an opportunity open to the government of the day, the freedom of every citizen is reduced. To suspend the rule of law under any circumstances is to leave open the possibility of the grossest injustices being perpetuated³³”

Torture and Police Brutality

The realities of police brutality as documented by Afronet³⁴, Human Rights Watch³⁵ and Amnesty International³⁶, including Zambia's own governance institutions, such as the Permanent Human Rights Commission, the Munyama Human Rights Commission and the Japhet Banda Commission on allegations of Torture, all bring out indefensible human

³² Article 25, The Constitution of the Republic of Zambia (as amended)

³³ Nyerere J.K, Freedom and Unity, P. 312

³⁴ Human Rights Watch Reports 1997-2001

³⁵ World Human Rights Reports

³⁶ Global Human Rights Reports

rights violations that stare the state in its face. Since in these reports, the state has acted callously, calls into question its commitment to international legal obligations, not the least, its own laws. For instance, as indicated above, Article 15, absolutely forbids torture under any circumstances. Yet, the crime of Torture has been committed and independently verified. This is probably the reality of actions of a Sovereign state, wherein, unless citizens exercise people power to enforce human rights, state power remains omnipotent.

An objective test based on case law and other credible reports, offer very little hope that supports Zambia's commitment to human rights. What may be useful, is to understand Zambia's situation, which is similar to most Africa, is a holistic understanding of the origins of an African state. We find comfort in the views of An-Na 'im, when he posits that:

“ These states are the product of arbitrary colonial histories and decolonization processes, continuing the same authoritarian policies and exceeding them in their ability to oppress and control, rather than protect and serve their citizens. They are based on ad hoc constitutional systems, which were hurriedly set up at independence, only to collapse or be emptied of all meaningful content within a few years. Their legal systems are usually poor copies of the colonial legal systems, lacking legitimacy and relevance to the lives of the majority of the population at large... Their economies are weak and dependent on global processes beyond their control³⁷”

As stated above, the systemic failure of Zambia, to engage in a real 'home-grown' paradigm shift, will until executed, remain a major constraint.

The above overview, extrapolated from a continental study, leads us to engage in a soul-searching exercise. Forty-one years after independence, Zambia, is still unable to find its feet – at least in as far as the existing inadequate and inappropriate legal framework, is concerned. In our view, this scenario of intellectual inadequacy, can only be explained by admitting to inertia. It is the inability of Zambians to engage at all levels, the inability to question/interrogate, issues, the inability to be pro-active, that may have opened up the country to unending abuse³⁸. Vices ranging from absolute illiteracy, to functional

³⁷ An-Na 'im Abdullahi A. (ed) Universal Rights, Local Remedies: Implementing Human Rights in the Legal Systems of Africa, Interights/Afronet/GTZ, London, 1999, P.23

³⁸ Zambia's legal system is heavily dependent on English laws, whose relevance to Zambia, is more a matter of convenience, than reflecting the true nature of the Zambian society.

illiteracy, are so pervasive as confirmed by this author in random interviews³⁹ on how many people, had read the report and recommendations of the on-going Constitutional Review Commission.

Conclusion

As Argued above, it cannot be seriously canvassed that Zambia has a strong commitment to respecting human rights. What may appear as a commitment may actually be a thrust, towards political correctness. At the same time, it would be unfortunate to argue that the government policy is to undermine human rights. Of course, the explanations to the many violations may be explosive, but the fact that there exist institutions, dealing with governance issues is worthy of mention. We propose to examine the operations of these institutions at the same time that we look at Zambia's human rights record in Chapter three.

³⁹ Interviews conducted in the month of November at the University of Zambia, the Evelyne Hone College, Chainama Hills College, Bauleni Compound, Malata Compound and in the Central Business District of Lusaka

CHAPTER THREE

Zambia's Human Rights record

Overview

This is a broad topic and what we discuss in this chapter are mere highlights, based on what the author considers to be incidents that describe Zambia's human rights record. The approach takes into account the limitations of accessing data on human rights violations in the country.

By necessary implication, reference to a country's human rights record, necessarily requires measuring the pulse of the nation. In the context of this discussion the pulse is best appreciated in a legal framework of the country. Again, a legal framework must project relevance and ownership, otherwise citizens would be alienated and in the same vein, government would not feel obligated towards its people. Lord Denning, amply discussed this postulation, regarding the relevance and adaptability of the common law system, in a privy council decision in the case of *Nyali V Attorney General*⁴⁰. Based on the discussion in the previous chapter, it is not certain that a discussion on Zambia's human rights record, as premised above, would be complete without due regard to colonial heritage and subsequent initiatives established to deal with human rights abuses..

Notwithstanding the above observation, we will discuss Zambia's human rights record on the basis of various governmental actions and what the law provides or does not. While we mentioned colonial vices in the other two chapters, any continuation or substantive reference to the colonial legacy, may begin to sound apologetic, since, apart from space considerations, it can be argued that Zambia has had time and great opportunities to engender processes and practices, which reflect the will of the people. Thus far, we shall look at this subject from the point of view of obligations and duties of a sovereign state, (Zambia) , as provided for by domestic and international law.

⁴⁰ [1956] 1 Q.B.1

Constitutional guarantees

Anyangwe observes that, “Constitutions, constitutionalism and democracy provide the legal and political setting conducive to a better protection and promotion of human rights. Only constitutional and democratic states are likely to offer the best framework for human rights protection⁴¹”. The Zambian Constitution, guarantees a broad range of rights in part III, yet a close examination of the constitutions and practice from 1964, as we shall see later presents a “zero option” scenario as a result of Zambia’s geo-political situation, occasioned in part by the liberation of Southern Africa.

It may actually be argued that although the spirit of protecting human rights is visible in the constitutions, there are fundamental gaps, which may be attributable to the existing constitutional design. The Direct Principles of State Policy in part IX of the 1991 Zambian constitution, reflect a clear lack of commitment to human rights, as the lofty provisions are neither justiciable nor useful in deepening a human rights culture. The foundation of the bill of rights in the Zambian Constitutions (past & present), raises problems of legacy, as alluded to in Chapter two. But, that is a reality, which must be factored in understanding Zambia’s human rights record.

What is the backdrop to the record?

Zambia’s human rights record has been characterized by many instances of police brutality⁴². This is against the background of a nation at cross-roads, given the hostile geo-political situation that Zambia was in for several decades. Whether the continuation of the state of Emergency, under the circumstances, was justifiable, is beyond our mandate. Suffice to say, Emergency laws, by implication tend to undermine the respect for human rights.

⁴¹ Carlson Anyangwe, Introduction to Human Rights and International Humanitarian Law, University of Zambia, UNZA Press, Lusaka, 2004, P.197

⁴² Afronet, Annual human rights reports, 1997, 1998, 1999, 2000, 2001 and 2002, Afronet, Lusaka, Zambia

It is said that the courts are the last pillar of defense for human rights. But, this is situational because, there is evidence of first republican President Kaunda, inciting UNIP party cadres to demonstrate against the decision of a High Court Judge, who at the height of the liberation struggle, found insufficient evidence to convict a Portuguese national perceived to be a danger to state security. When Chief Justice Skinner⁴³ up-held, the decision of Evans Judge; Kaunda accused the Court of bias on racial lines observing that *“blood was thicker than water”⁴⁴*.

This was the first open interference in the work of the judiciary by the executive, thereby pouring scorn on the protective and adjudicatory role of the courts. Whether Kaunda’s fears were valid or not, is immaterial, because there was no legal backing for Kaunda’s outbursts, but a danger to the independence of the judiciary. The political assault suffered by Chief Justice Skinner, did not only pose a problem for that time, but established a dangerous precedent, wherein the executive can easily temper with the independence of the court.

The offices that have been affected by capricious executive decisions, are that of the Chief Justice, the Director of Public Prosecutions (DPP) as well as Judges⁴⁵ of the High Court. What clearly seems to be part of career progression, is the creation of government agencies, such as the Anti-Corruption Commission⁴⁶, and the Electoral Commission⁴⁷, which appear to offer an opportunity for the executive to extend patronage to Judges, through promotions.

The tenure of office of the Inspector General of police is not protected, although it is critical to the rule of law. Only this year (2005), President Mwanawasa abruptly terminated the services of Inspector General Siakalima, for allegedly not “protecting” the president.

⁴³ Cited by B.O. Nwabueze in Judicialism in Commonwealth Africa, St Martins Press, New York, 1977

⁴⁴ Ibid

⁴⁵ Kabazo Chanda J. was forced to resign, after

⁴⁶ The late Kapembwa J, an accomplished judge was taken to head the ACC until his demise.

⁴⁷ Bwalya J took over from Muzyamba J, who took over from Ngulube DCJ. The position is currently occupied by Justice Irene Mambilima, a Justice of many years.

The manner in which law enforcement officers interface with the public leaves a lot to be desired and can be rightfully said to be a cardinal point in understanding the human rights crisis occasioned by this problematic relationship. It is easy to come to the conclusion that the police see part of their job as instilling fear in citizens. The battering of Journalists, Students, Opposition leaders and many more, simply serves to confirm this fear. In one case, a High Court Commissioner talking about the shooting of suspects, observed that:

“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 the people....Cases of shooting at suspects had become very very prevalent in Zambia. While the idea is to scare away would-be robbers, I do not think the use of fire-arms against suspects should be encouraged. Day in and day out we are reading about suspects being shot dead by police. In the end this republic is becoming frightened because of such incidents”⁴⁸

We must state that though these comments were made in 1984 – twenty one (21) years ago, this practice continued unabated as we shall see below. If the police were to plead self-defense, which is what personal interviews⁴⁹ in Woodlands, Lusaka Central, Kabwe, Kabwata, Emmasdale and Chelstone police stations revealed, then we have a bigger crisis, because criminals have continued to engage in illegality even when police are armed. No proper explanation⁵⁰ has ever been given by the command regarding excessive use of power by police. If the announcement by Police Commissioner, Francis Kabonde as per Radio Phoenix broadcast on Friday, 18th November, 2005 during the 13:00hrs news, is an indicator, then the police command is guilty of inciting extra-judicial killings, which incidents have actually tarnished the image of the police. It would be correct to take the view that Kabonde’s threats, represent the true feelings and culture of the police!

It will be noted that during the height of political problems in the eighties, the Zambia Army was called on to supplement the work of the police. This was a serious error of judgment. To drive the point home, we cite Alfred Chanda, who recorded that:

⁴⁸ The Times of Zambia, April 10, 1984 at 1. col.9

⁴⁹ Face to face interviews with author between January and October, 2005

⁵⁰ Interviews by Afronet, August 2000

“ The deployment of heavily armed soldiers along the Border with Zaire to stop smuggling...culminated in indiscriminate killings of suspected smugglers. On November 27, 1982, security forces were ordered to shoot on sight fleeing smugglers of essential commodities by Copperbelt Provincial Political Secretary, Pickson Chitambala....The Law Association of Zambia condemned the killings and described them as ‘cold-blooded murder’. However Alex Shapi a member of Central Committee defended the action. President Kaunda also defended the shooting of suspected smugglers as justifiable because of the circumstances under which the officers were operating⁵¹”

The fact that callous extra-judicial killings, were sanctioned by the political leadership, and endorsed by the head of state, can be said to be the highest form of insensitivity, that amply demonstrates, that Zambia’s human rights record can rightly be described as a post independence governance scandal. In other words, respect for human rights, notwithstanding the humanist rhetoric, was a far-fetched cry.

Commissions of inquiry on human rights abuses

Perhaps the most startling and shocking official reports of gross human rights violations are to be found in the Munyama⁵² Human Rights Commission of inquiry and the Japhet Banda⁵³ lead Commission of Inquiry into the allegations of Torture, Abuse or Violation of Human Rights on the Persons suspected of involvement in the attempted coup of 28th October, 1997. The Munyama Commission reviewed⁵⁴ newspapers and articles on human rights from 1972 –1995, under the powers conferred to it by Section 13(2) of the Inquiries Act.

Constitutional provisions, and apparent lapses or flagrant abuses, with regard to freedom of Association in the following terms, amply guided the Munyama Commission:

“ In spite of the existence of a justiciable Bill of Rights, the First Republic witnessed the harassment of opposition parties which included the African National Congress (ANC), the United Party (UP) and the United Progressive Party (UPP) by the United National Independence

⁵¹ Chanda A.W. Zambia: A case study in Human Rights in Commonwealth Africa, J.S.D. Thesis, Yale, 1992 P. 121

⁵² Report of the Human Rights Commission of Inquiry, Republic of Zambia, Lusaka, September, 1995

⁵³ Report of the Commission of Inquiry into the allegations of Torture, abuse or violations of human rights after the attempted coup of December 28th 1997, Republic of Zambia, Lusaka, 2000

⁵⁴ Op Citation, P7.

party cadres⁵⁵ and officials of the government of the day... Eventually, these parties were banned allegedly on national security grounds. Further during this time, hundreds of opposition party cadres were restricted or detained without trial under emergence powers”.

It is important to emphasize the fact that the Munyama human rights commission, draws immediate attention to the existence of the infamous state of emergence, which has been discussed earlier, and validates our conclusion that the State of Emergence, provides an environment highly conducive for illegality and rampant human rights violations:

“in July 1964, two months before the attainment of independence, the out-going British Governor, Sir Evelyn Hone, declared a semi-state of emergence, under which the government was sanctioned to utilize emergency powers to deal mainly with the Lumpa uprising in the Northern and Eastern provinces...Although the government suppressed that rebellion in 1964, the declared state of emergence was maintained until 1991 when UNIP was replaced⁵⁶ by the MMD”⁵⁷

The existence of the state emergence for 27 years, meant among others that security wings of government, were perceived with fear, and could not therefore be said to be facilitating the growth of democracy in the nation. It is in this light that the Munyama Commission noted that:

“ After all consultative meetings, there was unanimity that all had not been well in the past and further that there is need to re-examine and adjust certain aspects of those institutions’ functions and operations in order to make them accountable to the people they serve and to ensure that illegal activities and general misconduct which result in the violation of human rights are curtailed⁵⁸”

A sobering observation by the Munyama Commission was to the effect that, “ *the Commission discovered (as a matter of fact) that the taxpayers had paid heavily in the past and would continue to do so unless decisive action is taken to solve this issue⁵⁹”*

⁵⁵ Chilufya V Kitwe City Council

⁵⁶ The use of the word “replaced” is of great interest. It means that all the MMD was interested in was to take the reigns of power – with the same one party institutions. This has proved to be the case, as captured by Commissions of inquiry and independent reports from Afronet, US government, Amnesty and Human Rights Watch.

⁵⁷ Op Citation, P.12

⁵⁸ Ibid P.25

⁵⁹ Ibid

The evidence received by the Commission lead to the conclusion that there were twelve⁶⁰ broad areas of concern during Kaunda and Chiluba's tenures, which included: violation of human rights and harassment of political detainees; ill-treatment, torture and lengthy of detention of criminal suspects and illegal aliens by police and Immigration Officers; failure by police to investigate complaints against police officers; failure by police to prosecute cases of domestic violence and sexual abuse; abuse of police power; low caliber of police officers; break down in command; poor conditions of police camps; shortage of police stationery; delay in the administration of justice; issues relating to and incidental to violations of human rights; and involvement of the Presidency in human rights violations.

The Munyama Commission noted with profound concern that:

“ during the brief period 4th March, 1993 to 25th May 1993 when the State of Emergence was re-introduced during the ‘Zero Option’ saga, Police, Military Intelligence and Zambia Secret Security Intelligence operatives assumed the same attitudes and behavior that had been manifested during the Second Republic when political detainees were heavily interrogated and tortured, held incommunicado and denied medical treatment⁶¹”

The testimonies⁶² and evidence of detainees such as Messrs Webster Kapata, Francis Kunda, Edward Mucheleka, Lasford Kayula Nkonde, Felix Mwango, Elias Mwamba Kaenga, Francis Kunda and Major Ronald Chansa, give a clear indication that authorities callously treated suspects in an inhuman manner, which cared less for family life⁶³. It would appear that the evidence of some of the detainees to the Commission, suggests that the breaking up of families by security officers was a method widely used to advance mental torture.

Of the several incidents of police wrath, brutality and subversive activities, we have decided to reproduce here the findings of the Commission regarding one, Ms. Sandra

⁶⁰ Ibid

⁶¹ Ibid, P.27

⁶² Ibid, testimonies

⁶³ Ibid P.59

Mweetwa, as a reflection of a country in a state of lawlessness. The Commission noted that:

“ [One] illustrative case is that of Ms. Sandra Mweetwa who was mercilessly beaten by female and male police officers at Lusaka Central Police Station on the instigation of former MMD Member of Parliament Mr. Aaron Muyovwe (late) with whom she was living at the time. Mr. Muyovwe took police officers to his Makeni home for the purpose of searching and putting pressure on Ms. Sandra Mweetwa to return money which he claimed she had stolen from the bedroom. Although the search was unsuccessful, Ms. Sandra Mweetwa was driven by Mr. Muyovwe in the company of police officers to Lusaka Central Station, where she was badly beaten ...matter never went further... no charges and the police officers involved in assaulting Ms. Mweetwa have never been charged or disciplined!⁶⁴”

The Munyama Commission looked the Cases of *Justin Chimba and others V Attorney General*⁶⁵ and *Ronald Chansa V the Attorney General*⁶⁶, including other details obtained from the Ministry of Legal Affairs, then, and the Ministry of Finance, as **conclusive admission** by government on the **offense of torture**. Sadly, even in the light of such an assessment by a Commission, which was lead by a prominent Lawyer, Bruce Mumyama, only five years later, the Zambian government was a target of accusations of rampant torture in police custody by human rights activists. The Banda Commission, confirmed that the offense of torture had indeed taken place. The Commission noted that:

“ In the context of the investigation of the 28 October, 1997 attempted coup, it was established that suspects were subjected to both physical and mental torture in various forms. Physical torture usually took the form of beatings, burning, deprivation, electric shock, posture, sexual harassment and suffocation. Mental torture on the other hand, took the form of simulated execution, solitary confinement, degradation, insults, threats, witnessing torture and exposure when on toilet...⁶⁷”

Quite clearly, the Banda Commission is more than complimentary and raises fundamentals regarding any claim by government about a good record when no evidence of correcting the wrong is discernible. Regarding the extent of torture in the aftermath of the aborted 28th October coup, the Banda Commission put it bluntly as follows:

⁶⁴ Ibid P33

⁶⁵ [1972] Z.R.165

⁶⁶ SCJ/8/97/1983 (unreported)

⁶⁷ Banda Commission of Inquiry, P.vi

“ The Commission established that some of the acts of torture carried out by the police and security officers were so severe that they destroyed the dignity and impaired the capability of the victims to continue with their normal lives and activities. The victims were both physically and mentally affected to the extent that they had no choice but to make incriminating statements. The Commission was shown scars and some permanent injuries sustained by the suspects as a result of torture. Some of the victims are still complaining from the after effects of torture⁶⁸”

An examination of the methods used for torturing suspects is so elaborate⁶⁹ and comprehensive such that one is left to conclude that the state of emergence was designed to facilitate state security wings to unleash fear upon citizens. In fact as UNIP's hold on power was waning, the Zambia National Broadcasting Corporation ran an advert before every main news to the effect that “ **UNIP is Fire**” – presumably reflecting its official symbol of a burning flame! But it can also be said that the symbol depicted the party's disrespect for human rights – as the flame and slogan warned would be dissenters..

The fact that no law in Zambia criminalizes torture is another reason why we think that government has no intention to punish those found guilty of the offense of torture. Indeed, no officer, has been punished for such an offense, which makes recurrences an everyday possibility.

An overview of cases before the African Commission on Human and People's Rights, particularly cases such as *Henry Kalenga V Zambia* [11/88] *Rencontre Africaine pour la defense des Droits de l'Homme V Zambia* [71/92], *Amnesty International V Zambia* [212/98] and *Legal Resources Foundation V Zambia* [211/98] as extracted from the Commission's Activity Reports⁷⁰ between 1994-2001 clearly shows that even though Zambia is a signatory to the African Charter and other international instruments, compliance remains a major problem. Efforts, as contained in a few country (Zambia) reports, which in all fairness are faint hearted and strong in misrepresentation, also demonstrate how, low respect for human rights ranks in Zambia. Our view is that there is

⁶⁸ Ibid, P. vii

⁶⁹ There are more than twenty-three polished methods of torture administered by Zambia Police, Immigration officers, Zambia Secret Intelligence Security Service and the Zambia Army Intelligence. The Commission was informed by officers from these institutions that any object, including basic items such as clothing, can easily be converted into “instruments of Torture”

⁷⁰ Institute for Human Rights and Development, Compilation of decisions on communication of decisions on communications of the African Commission on Human and People's Rights, Banjul, 2004

little difference between Zambia's human rights record and that of countries such as Zaire, Uganda, Kenya and many more, who masquerade as democratic states.

Conclusion

The setting up of the Munyama human rights commission of inquiry, should be seen as a realization by the new government that there was need for a holistic response to the problem of human rights abuses. This was done through the Human Rights Act number 39 of 1996, which declares that “ *The Commission shall not in the performance of its duties be subject to the direction or control of any person or authority*⁷¹”

The Human Rights Commission has been in existence for nine years. In this number of years, the Commission still lacks critical human resource, it is more comfortable with issuing statements and visiting police and prisons with no impact whatsoever. In all fairness, it is not clear what the Commission is expected to do, because it can only make recommendations and what is worse, it faces a government whose interest in promoting human rights is more a public relations exercise than anything else.

The views of the Munyama Human Rights Commission, that unless something is done, human rights violations will remain rampant, are as valid as at the time. This remark, against a litany of human rights violations from independence to date, is more than a good summary of Zambia's human rights record.

⁷¹ Human Rights Commission Act no. 39 on the extent of Commission's Powers

CHAPTER FOUR

The Zambian Courts: Protectors or Pretenders

Overview

In this chapter, we seek to interrogate the extent to which human rights in Zambia are guaranteed of effective protection by Courts of law. We are prying into this matter at a time when there are serious human rights issues before Zambian courts, and it is evident from the preceding chapters, that the courts in Zambia, are unable to rise to the defense of civil liberties, when it matters most. This tendency is pronounced when judges are confronted with cases that affect executive power. For emphasis, we take the example of the case of *Nkumbula V Attorney General*⁷², where the plaintiff appealed against a decision of the High Court dismissing an application under s. 28 of the Constitution for redress on the grounds that the provisions of Chapter three of the Constitution, were likely to be contravened in relation to the applicant. In dismissing the appeal, Baron J, concluded that “ *it is common cause that no executive or administrative action has been taken in relation to the appellant, and it is not alleged that any such action is threatened; s.28 cannot therefore be invoked....*”.

We have discussed the impact of the one-party state earlier, and this decision, still remains law, through the principle of *stare decisis*. A recent decision which benefited from *Nkumbula V Attorney General*, and supports our claim above, is *Zambia Democratic Congress V Attorney General*⁷³, which was an appeal against a High Court decision, rejecting Judicial Review over a matter challenging the decision by the President and his cabinet to amend the constitution on the ground that the said change sought to alter or destroy the basic structure or framework of the constitution. Citing *Nkumbula*, the Supreme Court noted that “ *In Zambia, legislative process or Acts of Parliament cannot be arrested by commencing proceedings for Judicial Review. On*

⁷² [1972] Z.R. 204

⁷³ (SCZ Judgement No. 37 of 1999), Unreported

grounds of procedure alone, the application was misconceived and ought to have failed ab initio”

It cannot be disputed that the two cases cited above have far reaching consequences, regarding the posture of the bench on issues, which could possibly bring it into conflict with the executive. In another case, where Resident doctors⁷⁴ had been arrested for illegal assembly, the Court found for the doctors, but declined to award damages, notwithstanding the fact that doctors had been seriously affected through unlawful imprisonment. On appeal, the Supreme Court awarded paltry amounts and at the time of writing this paper, government had made no payment. Regrettably enforcement of judgments, particularly where payments are involved, remains a serious human rights violation. Writing in the Zambia Law Journal, Mumba Malila⁷⁵ observes that:

“ There was clearly a problem with a legal provision that apparently sanctions the ignoring of court orders and judgments. This problem ought to have been addressed by the highest court in Zambia. To ignore it as the Supreme Court did in Stickrose⁷⁶ only serves to introduce a further anomaly into an area of law already rife with injustice⁷⁷”

It is our submission that efforts at litigation, is aimed at seeking redress and the question that begs an answer is whether courts should substitute the decision of public officers, with their own. Equally, whether sections 16, 21 and 22, of the State Proceedings Act, which severely restrict enforcement, are consistent with human rights standards. In fact, provisions of the state proceedings Act cited above, are a clear challenge not only to the observance of human rights but also the integrity of the Judiciary as a citadel of justice.

The Judiciary

⁷⁴ Resident Doctors’ Association V Attorney General

⁷⁵ Mumba Malila is the current Chairperson of the Zambian Human Rights Commission

⁷⁶ SCZ Appeal No.127/98: This is a matter where Stickrose sought to have the Permanent Secretary, Finance, to be cited for contempt of court for failure to release funds to satisfy the judgement debt against the state.

⁷⁷ Mumba Malila, “ Mocking the successful litigant: Legally sanctioned denial of the fruits of judgement in Zambia” Zambia Law Journal, University of Zambia, Vol. 37, 2005, P.36

Anybody who alleges that his human rights have been abused and is desirous of legal redress may petition the High Court as did *Mulundika* and many others, under Article 28 of the Constitution. Article 28 reads in part as follows:

The High Court has wide and inherent powers and Article 94 of the Constitution of Zambia, in part reads as follows:

*“There shall be a High Court for the Republic which shall have, except for the proceedings in which the Industrial Relations Court has exclusive jurisdiction under the Industrial Relations Act, **unlimited and original jurisdiction** to hear and determine any civil or criminal proceedings under any law and such jurisdiction and powers as may be conferred...”⁷⁸*

A review of selected cases of unlawful detention, could as well lead one to the erroneous conclusion that the Courts have been courageous in handling such matters of illegal detentions. **We ask:** At what cost has the lengthy trials, been to the health and dignity of detainees? Our standpoint in this part of the Chapter is to interrogate the steadfastness with which the courts have acted to preserve human rights and not necessarily that ultimately the illegally detained persons have been set free by the courts with an imaginary award of damages.

A sample of cases⁷⁹ in which the courts held for the petitioners, are mostly that of unlawful detentions such as *Chipango V Attorney General*, *Kawimbe*, *Re Seegers*, *Re Alice Lenshina Mulenga*, *Re Chiluba*. All these cases are similar in that they all reflect the state’s desire to curtail individual liberties, through trumped up charges where and when illegal detentions, can only attract police action in a state of emergence. Surprising, though understandable, a lawyer of many years of standing, Julius Sakala, in his doctoral thesis argues that :

⁷⁸ Constitution of the Republic of Zambia, as amended in 1996

⁷⁹ Cited by Muna Ndulo in *Civil Liberties Cases in Zambia*, The African Law Reports, Oxford, 1984 PP 340, 171, 253, 304

“ These cases...demonstrate a determination by the court to uphold the right to personal liberty as enshrined in the country’s Constitution⁸⁰”.

Whether the courts can be commended for allowing detainees to languish in filthy cells, for days/months on end without relief, when no crime has been committed, attracts a better and serious exposition of Sakala’s observation above. This leads us to have a glimpse of the main actors in court – the judges.

Judges

Judges of the Supreme Court by nature give finality to litigation and this practice is well established under the doctrine of *res judicata*. A comfortable moral proposition is that Judges are men and women of high integrity, who only dispense justice. Whether this is true or not is not our concern here. We are concerned with the role that judges play in ensuring that human rights cases, are not subjected to strict rules and procedures of the high court, such as *Locus Standi*.

But who are Judges? This question attracts a notorious answer and has long been settled. A perception has been created by society, on who judges are. One scholar has described a judge in the following terms:

“The Judge is a prototypical legal institution. In his [her] robed and exalted independence he is the very apotheosis of fairness. The social service that he renders to the community is, in Lord Devlin’s words ‘the removal of injustice’. The impartiality that informs his judgments in the settlement of disputes is nothing short of an article of faith in a free and just society⁸¹”

We submit that such postulation is no more than a fertile reflection of the human mind, in its state of unquestioning belief. Until it is accepted that Judges are mortal and prone to the same possibilities that confront every other person, our sense of justice will be tilted

⁸⁰ Sakala Julius, The Role of the Judiciary in the Enforcement of Human Rights in Zambia, Phd Thesis, UNZA, 1999, P. 229

⁸¹ Wacks Raymond, “ Judges and injustice” in The South African Law Journal, Juta & Co. Ltd, Johannesburg, Vol. 101 Part II May 1984

and influenced by a mental fiction, presented as fact, which at best only presents drama. Our argument, is premised on the fact that different societies have Judges. Even the most barbaric regime⁸², has a sense of justice. We might add that while each legal system has judges, judges work in a certain framework that must up-hold the law as it stands.

The Indian Supreme Court has produced some of the most prolific and progressive judges, yet India, just like Zambia, was a British Colony. The fact of departure, clearly suggests that societal values determines the milieu of judges that emerge in any situation. A judge in racist South Africa, would have to be comfortable implementing racist laws, without any iota of fear or guilty. Equally a judge in troubled Zimbabwe, will have little difficulty deciding in favor of government, as has been demonstrated in many other jurisdictions, which include Zambia, primarily because judges in our view, are a necessary component in the journey of injustice.

In the historic case of *Shamwana V Attorney General*⁸³, the plaintiff applied to the Supreme Court against a decision by the High Court to grant him a *writ of habeas corpus ad subjiciendum*. The plaintiff sought to challenge the Governor's declaration of the existence of a grave situation under s. 4 of the Preservation of Public Security Ordinance⁸⁴. The other ground of the appeal also sought to challenge the interpretation of s. 29 of the Constitution. In short, the appellant was of the view that the grounds for his detention were non-existent. But Silungwe CJ cited, among others, regulation 3 of the amending statutory instrument, which provides that:

*" anything lawfully made, done or commenced under the existing law amended by this Order which, immediately before the date of commencement of this Order, was of, or was capable of acquiring force or effect shall, subject to the provisions of the existing law, continue to have or to acquire force or effect, as the case may be, and shall, on and after that date, be deemed to have been made, done or commenced, as the case may be, under the existing law as amended by this Order"*⁸⁵

⁸² Military regimes and systems based on the practice of apartheid

⁸³ Cited by Muna Ndulo & Kaye Turner, Civil Liberties Cases in Zambia, The African Law Reports, Oxford P.175

⁸⁴ Made on July 28th, 1964

⁸⁵ Cited in Muna Ndulo & Kaye Turner, Civil Liberties Cases in Zambia, The African law Reports, Oxford, 1984 P.179

The Chief Justice also went on to say that: “...*Secondly, Presidential satisfaction that the situation in Zambia was so grave that it was necessary to make regulations for the detention of persons....This means that the detaining authority exercises his power of detention under the regulation when he is satisfied that grounds exist for the detention of a person for the purposes of preserving public security*⁸⁶.”

Consequently, the appeal was dismissed and practically, the court ignored Article 15 of the Constitution, which forbids Torture in **absolute terms**. . Add to the dismissal of such an appeal, is the terrible and inhuman conditions⁸⁷, under which detainees are subjected to. Clearly, it cannot be disputed that the cited sections of the judgment run contrary to human rights standards, as they circuitously, place the President above challenge on matters of individual liberties under such similar circumstances.

In *Re Puta*⁸⁸, the petitioner, a lawyer, challenged the legality of his detention. The trial Judge found as a matter of fact that the petitioner was treated in an inhuman manner. Sakala J, as he then was, held that “ In the circumstances, having accepted the petitioner’s story, I hold that he is entitled to an award of damages for the inhuman treatment complained of in his petition...” On the other grounds petitioned, Sakala J, borrowed from a decision of the Supreme Court in *Re Kapwepwe*⁸⁹, were Baron J as he then was said:

“ *And one must not lose sight of the fact that there is no onus on the detaining authority to prove any allegation beyond reasonable doubt, or indeed to any other standard, or to support any suspicion. The question is one purely for his subjective satisfaction*⁹⁰”

The final holding of Sakala J is that:

⁸⁶ Ibid PP 180-182

⁸⁷ Judicial officers, such as Magistrates and Judges, have access to prisons and all detention centres in Zambia. It smacks of unfairness for a Judge or magistrate to pretend to have no choice, but implement the law, which clearly is at variance with fairness.

⁸⁸ Ibid

⁸⁹ Ibid

⁹⁰ Op.citation P.197

“ For the foregoing reasons, I hold that while the petitioner is entitled to damages for inhuman treatment complained of in his petition, his detention is lawful and accordingly I dismiss the petition to that extent⁹¹ ”

Analyzing the above views of the court, clearly presents a crisis of expectation. Legality in Zambia, and most jurisdictions, holds sway over legitimacy. The Judge’s position in both cases above, is what can be described as extreme positivism, which is averse to both morality and common sense. Indeed, since good governance is part of a human rights culture, we are at pains to identify the location of human rights considerations, in most judgments of the Courts in Zambia. This is compounded by the fact that until in the very recent times, magistrates and judges in Zambia have had no opportunity to be trained and therefore grounded in human rights law.

In this regard, it is clear that Judges in Zambia are prisoners of trappings of power. In a recent discussion with some Judges on the Zambian bench⁹², it is clear that while they acknowledge their extensive and inherent powers, they are not willing to antagonize the executive, simply because, they see themselves as being in employment as opposed to having a job that must be done. The net result, is atrocious judicial pronouncements such as the holding of Lewanika J, as he then was in the case of *Mulundika and Seven Others V Attorney General*⁹³ in the High Court, when the trial judge observed that granting *Mulundika* relief, would amount to sanctioning anarchy (sic)! If *Mulundika* had not been appealed against, Lewanika’s decision in the High Court could have been a dangerous precedent in the hands of timid judges.

We submit that if the Zambian Judges were to decide in a similar spirit as that exhibited in *Mulundika and seven others V Attorney General*⁹⁴, where the Supreme Court quashed ‘offensive’ sections of the Public Order Act, then Judges would really be advancing the human rights agenda. Another impressive decision is that by Musonda J, in *Clarke V*

⁹¹ Ibid P 202

⁹² Discussion with High Court Judges, High Court buildings, 23rd November, 2005.

⁹³ 1995/1997 ZR P.20

⁹⁴ Ibid

*Attorney General*⁹⁵, where the Judge considered the legality of deporting Mr. Clarke and ruled against the state for want of rationalization. There can be no debate as to the possible consequences of the appellant, if the court had been indifferent in the matter.

Social Background of Zambian Judges

In Zambia, the social background of judges is determined by the school system. Those who have had the opportunity of getting admitted into the law school find themselves on the bench not as a matter of socialization but a coincidence of opportunities created by the political system. For a long time to come selection of judges will continue to be influenced by the selection process of the only law school in the country.

Access to Courts

Referring to the broader picture of access to Justice, Sakala Julius notes that:

“ Access to Justice is the right of an individual to use the due process of Law. The due process of law requires the observance of the rules of natural justice through the rule of law. In the narrow perspective, the concept of access to justice entails the right to have a matter determined by a court of law. In a wider sense, it involves a number of issues before, during and after justice⁹⁶”

Our interest, which is guided by the limitations of this exercise, is access to the courts of law. In the literal sense, one can argue that courts in Zambia are generally accessible, to the extent that it is possible for a litigant to file a complaint, provided that any such compliant fulfills court procedure. Indeed, there is no strict requirement that a person wishing to litigate in the High Court, would need the assistance of Counsel.

Our findings are that people affected by police brutality, would want redress. The problem is that there are many factors, which hamper access to courts. Such include, Locus Standi, costs of litigation, ignorance and the fact that the police perpetrated some of these most heinous crimes, yet punishment is for the courts, but only after judgment has been entered and according to the Penal Code.

⁹⁵ Zambia Law Journal P.159, 2004/HP/003, (unreported)

⁹⁶ Ibid P.342

Further, the limitation to accessing the courts is demonstrated by the case of one George Banda⁹⁷, who was shot by police, and severely wounded. He was admitted to the University Teaching Hospital for five months, and is now a cripple. He was charged with aggravated robbery, although according to the Legal Resource Foundation, the Police had suspect evidence, but what is important for us, is that to date (2005), the Police Officers who shot at Mr. Banda have not been identified. Mr. Banda can neither afford legal representation nor legal challenge against police brutality in the court of law. There was no indication that this case is anywhere near the courts of law. So, are the Courts accessible in such instances? Should the police be allowed to usurp power from the courts by punishing suspects? Quite alright this is matter that deals with the absolute failure of the police but we do here seek to show how such failure makes access to courts a pipe dream.

Going by Police Occurrence records⁹⁸ it is conservatively estimated that countrywide, there are over 10,000 human rights cases⁹⁹ of abuse that end at the police every year, without committal to court. The victim support Unit of the Police has this year (2005) alone recorded 3,496¹⁰⁰ cases of assault, of domestic violence. In all these cases, police conduct is in issue and extremely suspect; begging the question: What is the status of police detentions without trial? Shouldn't the police only be restricted to investigations and prosecutions in these matters? Why doesn't the police publicize assault occasioned by police officers, so that litigation would be easier for victims?

One "soft" case that touches on several human rights issues was brought to Court in Chinsali. The facts of this case are that in June 2001 One hundred Chinsali Girls' Secondary School Pupils were held in custody for almost a week after protesting over a teachers' strike. Crowding in cells was a fact not disputed. On 11 June, they appeared before a magistrate, charged with conduct likely to breach peace. They were denied bail

⁹⁷ Afronet, Zambia Human Rights Report, Lusaka, 2001. P 86

⁹⁸ These are kept at every police station or post in the country

⁹⁹ Interviews with Police Officers who sought anonymity and protection from identification August – November, 2005

¹⁰⁰ Police Spokesperson, 06.45hrs News bulletin, Radio Phoenix, Lusaka, 30th November, 2005

and there is no indication as to whether they had any legal representation. Bail was however granted to those whose parents paid an admission of guilty fine of K50,000.00.00. The pupils were subsequently all released but warned seriously¹⁰¹.

It is not at all clear why the pupils were taken to court. This in our view was an abuse of the due process and a demonstration that if the state wished, access to courts would be guaranteed for all citizens who have reason to commence an action against human rights violations, without let or hindrance.

Conclusion

It is doubtful whether there are judges on the Zambian bench, who look at cases from the point of view of deepening democracy and civil liberties. The approach by judges and indeed counsel is very legalistic. The fact that Zambia's legal order is permissive of violations, dampens expectations of having an activist bench. Litigants seeking redress on human rights violations, depend more on the discretion of the judge than an effective legal protection mechanism

¹⁰¹ Ibid, P.91

CHAPTER FIVE

A Complex Legal Regime

Overview

Zambia has a complex legal regime inherited from the British. We contend here that the complex legal order is primarily responsible for the country's governance problems. While law and order, are not alien concepts to Zambia, it cannot be disputed that the law as it stands today, is more a shadow of industrial Britain than a reflection of Zambian values, norms and tradition. Gann captures the rudimentary beginnings as follows:

“ The complex of the administrative machinery must of course not be exaggerated. The civil service was still limited in its functions, designed primarily for the maintenance of law and order. The bulk of social work continued to be shouldered by the missions, though the administration did set up a small and at first inefficient Government school for Barotseland, as well as giving some support to European education. Under these conditions the administrative machine remained sufficiently small to be supervised by the administrator, who remained the king-pin of government. The administrator, a carefully selected and relatively a highly paid man , supervised the work of all departments and attended to all political problems...The administrator was able to rule to his domain with little interference from outside...¹⁰²,”

In General, repeating what has already been in existence, is easier than beginning anew. The fact that the settlers did not waste time to adapt British laws, rules and procedures, as discussed by Gann, drives the point home. It goes without saying that there was need for importing personnel from England, if the imperial system was to develop further. The dilemma that comes out of such a set up is the challenge of responding to the conflicting interests that reflect this reality.

The following clusters of distinct interests, have in the course of literature review been identified:

- a) The missionaries
- b) The British South African Company

¹⁰² Gann L.H. A History of Northern Rhodesia: Early days to 1953, London, Chatto & Windus, 1963 P.149

- c) The colonial administration
- d) The settlers and
- e) The natives

It is difficult to appreciate how such diverse and distinct interests, can co-exist without severe conflict. Perhaps, that may be one of the explanations as to why the natives, who were bottom at the ladder of importance, first resisted domination and latter waged a sustained struggle for independence.

At independence, the major change was that a black government ascended to power taking over all the colonial structures, good or bad. The constitution establishing the Republic of Zambia, was crafted in London and handed over to the new government, which was too happy to have succeeded in defeating the imperial powers. Legislation, such as the highly controversial Public Order Act, Cap 113, Preservation of Public Security Act, Cap 112, the Organizations (Control of Assistance) Cap 116 of 1966 as read amendment Act no. 13, have their roots in colonial rule.

A commentary on the bill of rights

The 1991 constitution as amended in 1996 has a bill of rights whose origins can be traced to the 1963 self-government constitution. The centrality of a constitution in Zambia, is a given, but an examination of the Zambian constitution, from cover to cover, reveals many worrying Articles shrouded with serious contradictions. While there is an entrenched Bill of Rights, Article 25 specifically provides for wide derogations. There is abundant evidence that torture in Zambia, thrives during detentions and such is facilitated by Article 26, which stipulates the length of any detention (sic). Again detention cases such as *Chipango*, *Re Puta*, *Re Chiluba*, *Re Kapwepwe* discussed in chapter four, clearly shows how vulnerable human rights are, when Articles 30 or 31, declaring a state of emergence, as and when the President is satisfied that such a measure, is necessary.

On the surface of it Article 28, gives the impression of adequate prospects of enforcement, yet Article 28 (1) is defective because it refers to Clause (5) which is non-existent and it is not possible to envisage what limitation it was meant to impose. Besides, there is an in-built limitation, which permits abuse to take place provided it is lawful.

Article 29, is clearly in violation of the Charter of the United Nations as it expressly accommodates the act of war, which the United Nations frowns upon. As a general observation, the constitution is at variance with practice¹⁰³, a phenomena, which may be related to the fact that even the leadership looks at the document as a blue print for manipulation¹⁰⁴ rather than a source of regulation of society.

Two of the most violent and controversial pieces of legislation are the Public Order Act Cap 113¹⁰⁵ and the Emergence Powers Act, Cap 109.

A commentary on case law

It must be appreciated that Zambia's legal system, was pioneered by the British, on the basis of the various Orders in Council and other pieces of legislation passed by either the Colonial office or the local legislative council. For our purposes, we examine the composition of the highest court where all ten judges and justices are of British origin. The selected judgments of 1963 – 64, were edited by two Editors of British origin. In our view, this confirms a high level of dependence upon a system that is not locally brewed. Case law is a confirmation of the insidious nature of the common law system, which we have wholly inherited. It is a complicated alien system and to this we cite a dicta in *Nyali*

¹⁰³ Torture and Police brutality remains rampant. The Inspector General, Speaking on Let the People Talk show – Radio Phoenix maintains that the Police will continue to engage in extra-judicial killings. The IG also confirmed incidents of impropriety within the Police. He justified extra-judicial killings in the last few days as a measure intended to enhance confidence in the Police.

¹⁰⁴ As evidenced by the instability in the constitutional order

¹⁰⁵ 19th August, 1955. Mischief is described as “ An Act to prohibit the wearing of uniforms in conjunction with political objects and the maintenance by private persons of associations of military or similar character; and to make further provision for the preservation of Public Order” There has been more that 15 amendments to the Act and controversy continues unabated.

*V Attorney General*¹⁰⁶ In this case a dispute that had a Kenyan *situs*, Lord Justice Denning noted that:

“ Just as an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed but it needs careful tending. So with the common law. It has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and color all over the world: but it has also many refinements, subtleties and technicalities which are not suited to other folk. These off-shoots must be cut away. In these far off lands the people must have a law which they understand and which they will respect. The common law cannot fulfill this role except with considerable qualifications”¹⁰⁷

We cannot agree any more with Denning LJ. Gluckman who has taken an in-depth analysis of the Lozi Jurisprudence has effectively dismantled the assumption that pre-Zambian society had no laws. He notes that:

“ When we speak of transplantation, then, we really speak of grafting Western common law onto a body of local law which is frequently both comparable and perceptible to it”¹⁰⁸,

What it is beyond the purview of this chapter, is indeed to interrogate why the complex legal order has remained in a manner that truly reflect transplants. With respect to the legal transplants referred, it has to be appreciated that, while we are able to trace the fact of being of borrowed legislation, which is enforced with so much vigor, there is little to show that the said laws have been accompanied with conviction, belief, tradition and values of the sending country, for the simple reason that you can not wish Zambia's own tradition away.

In an interview¹⁰⁹ with the Zambia Law Development Commission, the fact of legislation which is at variance with the Zambian social order, was acknowledged. The Commission accordingly, is doing all it can to improve of law reform, but is constrained by the

¹⁰⁶ [1956] 1Q.B.1

¹⁰⁷ In Thomas M. Franck, Comparative Constitutional Processes: Cases and Material in fundamental rights in the Common Law Nations, Sweet & Maxwell, London, 1968, P.xxix

¹⁰⁸ Gluckman M. The ideas in Barotse Jurisprudence, Yale, 1965 also cited by Thomas M. Franck at P xxxxi

¹⁰⁹ Interview with the Acting Executive Director, ZLDC, 30th November, 2005

realities of underdevelopment. However, that notwithstanding, the Commission is working on a draft of a *Zambian Matrimonial Causes Act*, for submission to the Ministry of Justice.

Conclusion

An overview of *Zambian* legislation, suggests that at independence, the Crown was replaced by a President, as head of state. The failure to go beyond and undertake a complete overhaul of Colonial laws is what accounts for an unstable legal regime, whose ownership is doubtful. While one would understand the fact that *Zambia* had to deal with hostile neighbors, and therefore the justification for a State of Emergence, there are major studies by A. W Chanda, L Zimba and J. Sakala, which demonstrate that the administration of Emergence powers was problematic. As the Munyama report indicated, this problem was not only confined to the second republic, but spilled over to the third republic, as confirmed by another inquiry on torture lead by Banda J.

The *Zambian* constitutional order has remained unstable. From independence, the country has amended the constitution no less that four times and currently there is a contentious debate on another effort to either amend the constitution or have another constitution altogether. At best such a situation poses serious problems for stability and certainly undermines scholarly engagement.

CHAPTER SIX

Conclusion and Recommendations

Summary

Our major finding through out this research is that Zambia's human rights dilemma is directly linked to the absence of political will to redesign the colonial architecture that characterize governance in the country.

Having attained independence on 24th October 1964, the post independence leadership failed to immediately embark on a reform programme that would have witnessed substantive legal reform, so as to make way for the creation of institutions that would have been supportive of demands of governance by the new state.

Interpretation

The fact that even after forty years of independence governance and Human Rights problem still pose serious problems point to the fact that the country still has to define its priorities. It also means that the absence of strong institutions that will complement each other in the task of governance, has left individual liberties exposed for possible violations by the state and its agents. The fragility of the country has been laid bare every time a State of Emergence has been declared

Suggestions and Recommendations

We make the following recommendation to make Human Rights a reality in Zambia:

1. A Constitutional Order that is based on the centrality of civil liberties is a prerequisite for the effective protection of human rights.
2. A vigorous law reform programme, specifically aimed at developing laws which reflect more of Zambian values is critical. In our view, based on literature review and case law, there is reason to overhaul the present Emergence laws.
3. Law reform should take into account provisions of International Human Rights Law, so that the Country may be compelled to domesticate international legal instrument, with bearing on Human Rights protection.
4. The Curriculum at the Law School of the University of Zambia, should be overhauled. This should be done to ensure that graduate of law are well rounded with tools of analysis beyond the law.
5. The University of Zambia Law faculty should investigate possibilities of undertaking special training for Judges and Prosecutors. The law school should consider collaborating with the Human Rights Commission to mount in-service training for law enforcement officers.
6. The Judiciary should be encouraged to seek full autonomy in all manner so that at no time should a serving Judge worry about deciding against the Executive if need be.
7. The Judiciary should strive towards a more stringent and efficient bench. One of the ways of ensuring professionalism on the bench is by ensuring that Judges are not too dependent on Counsel for their research. Judges need qualified legal support, with Human Rights training, to ensure effective Human Rights protection

BIBLIOGRAPHY

Afronet Annual human rights reports, 1997, 1998, 1999, 2000, 2001 and 2002, Afronet, Lusaka, Zambia

An-Na'im A.A (ed) Universal Rights, Local Remedies: implementing human rights in the Legal Systems of Africa, INTERIGHTS/AFRNET/GTZ, 1999.

Bruno Simma, The Charter of the United Nations: a commentary, Oxford University Press, Oxford, 1995,

Buerghenthal T. International Human Rights in a Nutshell, West Group, 1995, P22

Carlson Anyangwe, Introduction to Human Rights and International Humanitarian Law, University of Zambia, UNZA Press, Lusaka, 2004.

Government of the Republic of Zambia, Chona Commission of Inquiry on the desirability of establishing a One Party State in Zambia, Government Printers, Lusaka, 1972

Muna Ndulo and Kaye Turner, Civil Liberties Cases in Zambia, The African Law Reports, Oxford, 1984

Gann L.H. A History of Northern Rhodesia: Early days to 1953, London, Chatto & Windus, 1963

Gertzel Cherry (ed) The dynamics of the One-Party State in Zambia, Manchester University Press, Manchester, 1984

Himwiinga P.A. Emergence Powers in Zambia, LLM Thesis, University of Zambia, Lusaka, 1985.

Institute for Human Rights and Development, Compilation of decisions on communication of decisions on communications of the African Commission on Human and People's Rights, Banjul, 2004

Kenneth Kaunda, Humanism Part II, Neczam, Lusaka.

Meebelo H. Reaction to Colonialism: a prelude to the politics of independence in Northern Rhodesia 1893-1939, Manchester University Press, 1971,

Mulford D C. Zambia: The politics of independence 1957-1964, Oxford University Press, 1967.

Nwabueze B.O. Judicialism in Commonwealth Africa, St. Martin's Press. New York, 1977.

Robert Allen (ed) Chambers encyclopaedic English dictionary, Larousse, Edinburgh, 1994

United Nations, ICJ Statutes, NY, NY.

United Nations, Universal Declaration of Human Rights, NY, NY, 1948

Statutes

Constitution of the Republic of Zambia, (1991) as amended in 1996

The Emergence Powers Act

The Human Rights Commission Act no. 39 on the extent of Commission's Powers

The Penal Code Act

The Preservation of Public Security Act

The Public Order Act

The State Security Act

The Zambia Police Act

Doctoral Thesis

Zimba L. The Constitutional Protection of Fundamental Rights and Freedoms in Zambia: A Historical and Comparative Study, University of London, 1969

Sakala Julius, The Role of the Judiciary in the Enforcement of Human Rights in Zambia, Phd Thesis, UNZA, 1999, ***

Chanda A.W. Zambia: A case study in Human Rights in Commonwealth Africa, J.S.D. Thesis, Yale, 1992

Articles/Speeches/Reports

Kenneth Kaunda, "Watershed Speech" Speech delivered to the National Council of the United National Independence Party, 1975

Kenneth Kaunda, Speech at Chifubu Rally on the Copperbelt, 17th January 1965 (also in Zambia: Independence and beyond – Speeches of Kenneth Kaunda, Thomas Nelson and Sons, London, 1966)

Mumba Malila, "Mocking the successful litigant: Legally sanctioned denial of the fruits of judgement in Zambia" Zambia Law Journal, University of Zambia, Vol. 37, 2005

Nyerere J. "Speech inaugurating the University College of Dar-es-Salaam", in Review of Contemporary Law (1964)

Report of the Commission of Inquiry into the allegations of Torture , abuse or violations of human rights after the attempted coup of December 28th 1997, Republic of Zambia, Lusaka, 2000

Report of the Commission of Inquiry into the allegations of Torture , abuse or violations of human rights after the attempted coup of December 28th 1997, Republic of Zambia, Lusaka, 2000

Report of the Human Rights Commission of Inquiry, Republic of Zambia, Lusaka, September, 1995

Report of the Human Rights Commission of Inquiry, Republic of Zambia, Lusaka, September, 1995

Radio interview with the Inspector General of Police Ephraim Mateyo "Let the People Talk Show" – Radio Phoenix, November, 2005.

Sikota Wina, Articles in Zambia Daily Mail, issues of Nov. 16, 30, and December 7, 14 and 16. Lusaka, 1977 cited in A W Chanda, Ph.D. thesis

The Times of Zambia, April 10, 1984 at 1. col.9

Wacks Raymond, " Judges and injustice" in The South African Law Journal, Juta & Co. Ltd, Johannesburg, Vol. 101 Part II May 1984