

Title: IS THE IMMUNITY OF THE STATE ABSOLUTE?

With Special Reference to The State Proceedings Act.

By

NYIRONGO, SAMUEL.

UNZA

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Special Reference to the State Proceedings Act.**

By

NYIRONGO, SAMUEL

Being a paper submitted in partial fulfillment of the examination requirements for the award of the Bachelor of Laws Degree (LLB) of the University of Zambia.

Submitted this 6th day of January, 2009

Faculty of law

The University of Zambia

P.o Box 32379

Lusaka

INSPIRATIONS!

Judges play a highly significant role in giving meaning and vitality to a Bill of Rights. The courts are indeed central to a constitutional order, both in the vindication of individual rights and in the allocation of authority between the State and the private individuals

Paul A. Freund; *The American experience with a Bill of Rights*

'So far as the individual is concerned, a constitutional government is as good as its courts. No better, no worse.'

Woodrow Wilson; *Constitutional Government in the United States*

I venture to believe that it is important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Shakespear, Machiavelli, Plato, Hume, and Kant as with the books which have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the question before him. The words he must construe are empty vessels into which he can pour nearly anything he will.

Men do not gather figs of thistles, nor flexible bodies of knowledge from judges whose outlook is limited by parish or class.

Judge, Leaned Hand; 20th century American judge.

For a constitutional judge, the importance of a capacious and philosophical mind is as fundamental as the document he must construe.

Paul A. Freund; *The American Experience with a Bill of Rights*

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

Certification

I recommend that the directed research paper under my supervision by

NYIRONGO, SAMUEL

ENTITLED:

**IS THE IMMUNITY OF THE STATE ABSOLUTE? WITH SPECIAL REFERENCE TO
THE STATE PROCEEDINGS ACT.**

Be accepted for examination in partial fulfillment of the requirements of the award of the Bachelor of laws degree of the University of Zambia. I have checked it carefully and I am satisfied that it fulfils the requirements relating to the format as laid down in the regulations governing directed research essays.

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DR. MATIBINI, PATRICK
SUPERVISOR

.....
9th FEB, 2009

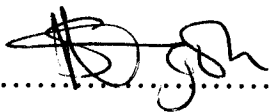
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I NYIRONGO, SAMUEL, computer number 91087384 hereby declare that am the author of this directed research paper entitled “**Is the immunity of the State absolute? With Special Reference to the State Proceedings Act,**” and that, it is a creation of my own ingenuity and skill. I have duly acknowledgement all works of other scholars as cited or used in the course of this paper. I truly and honestly believe that this paper has not been previously presented in the school or indeed anywhere for academic work or other purposes.

I remain accountable for all the shortcoming, errors, misstatements or omissions in the work.

Student’s Name : NYIRONGO, SAMUEL

Signature 

Dated this ..6th..... day of *January*, 2009

DEDICATION

I dedicate this paper to Nsamwa and Kwangu Nyirongo my late beloved ones who are not going to see me being admitted to the Bar, to me your memories as still fresh. We will one day meet and remind each other of the warm affection we hold for each other.

And to Richard Zebbie Nyirongo whose death still remains unexplained. The enforcement authorities could have done better, but they chose to be negligent and unprofessional when the law and procedures to be followed, are well laid down. Consequently the suspect evaded the criminal prosecution.

The three of you never leave my mind.

I love you. *Je t'aimer.*

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To the Law school, I say thank you for allowing me to express myself on this *august* topic. The school gave me an opportunity to clear my mind over an issue that quizzed my mind since the 2nd year of in Law school.

I would also want to express my gratitude to the following persons for their valuable contribution; Mr. Mumba Malila S.C (as Attorney General), Mr. Vincent Malambo (S.C) of Malambo & Co., Mr. P. Mulonda (Lecturer in Law ,UNZA), Mrs. C. Maimbo (lawyer) of The Law Development Commission, and Mr.B.Phiri (Economist)of the Ministry of Finance.

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ABSTRACT

“In the course of administering certain legislation, public officers are bound to abuse or well intended legislation. It is therefore important that the manner of administering certain legislation is guided by acceptable standards or tools designed to check against such abuse. Especially, when such legislation is being administered in relation to the constitution provisions. Increased participation of the State in the provision of public services, also increased interaction with the individuals, resulting in frequent violation of the individual human rights by the State. It was necessary that the hitherto immunity from court enjoyed by the State was eliminated, in order that the State is made answerable for the violation of the human rights., Thus, the object of the State Proceedings Act (the Act) is to reduce the status of the State in litigation, to equal that of other ordinary citizens. Section 16 of the Act prohibits court from issuing coercive orders against the State. The rationale for immunity of the State under s.16 is meant to ensure that the functions of the State are not unnecessarily impeded or jeopardized. However, the public officers charged with administration of this Act insist that the immunity under s.16, is absolute. The courts have upheld this contention and held that coercive reliefs, including interim injunction, cannot lie against the State. Thus, the courts continue to apply the immunity in a wholesale fashion. Should this immunity of the State from coercive orders under the Act be absolute even when the issue is a proper constitutional case brought in terms of Art.28 of the Constitution? And if not, in what form should it be retained? Since the purpose of s.16 is to immunize the State against unwarranted coercive orders, the immunity of the State must not be absolute when the issue is a proper constitutional case brought under Art.28. The rationale being that applying the immunity under s.16 in absolute terms is tantamount to subordinating Art.28 to s.16, contrary to Art.1 (3). In order to harmonize the immunity imported under s.16 of the Act vis-à-vis Art.28 of the Constitution the immunity of the State under s.16 must, and only in relation to a proper constitution case brought under Art.28, be narrowly construed or frozen. This will allow an applicant in a deserving constitutional case to be able to obtain any relief including the prohibited reliefs, as against the State. So that the full immunity also, may only be invoked in appropriate cases. In order to harmonize the two provisions, there is need to adopt a proportional test approach when interpreting the interface between s.16 vis-à-vis Art.28. So that the immunity is interpreted on case by case basis. In this way, the immunity under the Act is restricted to serving its intended purpose, and the supremacy of the Constitution is not antagonized.”

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Chapter 1

1.0 Introduction

The concept of state immunity which basically shields States from having to defend themselves in suits before Courts is as old as the emergence of the modern state itself. In the United Kingdom (U.K), the basis for crown privilege was that the *'king can do no wrong' and since the king is owner of the Courts no agency could enforce the law against the king before the king's own courts. As such the immunity was, in that jurisdiction absolute*¹. This notion was later implanted in countries that were colonized by Britain, including Zambia.

Conservative proponents of state immunity saw judicial restraint against the State as necessary for purposes of ensuring that state machinery was not grounded to a halt. Therefore, it was desirable that a special status is accorded to the State to enable it continue providing goods and services for the common benefit of all citizens. Thus, in absolute terms, State immunity therefore, meant that litigants whose rights were violated at the hands of the State had no remedy because the State could not be dragged to Court.

The State is today known as the worst violator of human rights. Consequently, there have been calls in recent years, especially after the First World War, to have this immunity stripped in order that the State violator is made answerable for its wrongs against citizens. This was also deemed necessary for purposes of ensuring that the principle of equality before the law is fulfilled. In essence, the status of the State in litigation would thereby be reduced to equal that of any other ordinary litigant.

1.1 Statement of the Problem

The Bill of Rights under the Constitution enumerates the Fundamental Rights Freedoms of the individual. These rights are basic and are said to enjoy a status of presumptive inviolability. The Bill of Rights also contain the instances when these rights may be abridged or restricted. The permissible derogations include inter alia requirements in public interest, for public order and public health. The immunity of the State against coercive reliefs, as provided for under s.16 of the State Proceedings Act (the Act), falls within matters required in public interest. Article 28 of

¹ H.W.R Wade Administrative Law ELBS Oxford University Press (5th ed. 1986) at p 698

the Constitution grants power to the High Court to issue any appropriate relief to a person who alleges that his rights are being or will be infringed by the State. In this sense, the Bill of Rights is structured in such a way that the enjoyment of the rights is balance against, inter alia, the public interest. In interpreting the interface between s.16 the Act and Art.28 of the Constitution, the courts in Zambia have held that an interim injunctive relief cannot lie against the State. In other words, the courts insist that the State enjoys absolute immunity against injunctive reliefs. According to the Supreme Court an interim injunction was not tenable in view of s.16 of he Act or under Art.28. Therefore, as the law stands in Zambia, the law will not come to the aid of an applicant who seeks an injunction for purposes of preventing a violation or stopping the continued violation of his rights by the State. In this sense the question that arise is this; Is s.16 of the Act consistent with Art.28?

1.2 Objectives

1. To determine whether the immunity of the State as provided for under the State proceedings Act and enforced by the courts is or should be enforced in absolute terms.
2. To determine whether the immunity can be qualified.
3. To assess the impact of State immunity on the protection of fundamental rights and freedoms.
4. To determine whether s.16 of the Act is consistent with Art.28 of the Constitution.

1.3 Research questions

1. Is the immunity of the State under the Act absolute?
2. Is s.16 of the Act consistent with Art.28 of the Constitution?
3. Does s.16 violate the fundamental rights under the Bill of Rights?
4. To what extent if any does restrictive immunity jeopardize the function of the State?
5. Is a declaratory order of the parties' rights sufficient remedy in a proper constitutional case?

1.4 Research Methodology

Data collection will mainly be done by desk research supplemented by personal interviews with various persons and relevant institutions. Data will be sourced from books, statutes, case law journals student directed research, newspapers, the internet and law reports.

1.5.0 THE CONCEPT OF STATE IMMUNITY: -Definition, Scope and Rationale.

1.5.1 Definition-The concept of state immunity refers to *the exemption or state of freedom from certain legal consequences or the operation of certain legal rules, or exemption from certain court orders.*² Immunity is also seen as *exemption from performing duties which the law generally requires other citizens to perform or an exemption from penalty, burden or duty*³.

Thus, the concept of state immunity operates to exempt the state from certain legal consequences or certain court orders.

1.5.2 Scope- The concept of state immunity is often used to refer to any of the three distinct but closely intertwined concepts. Namely, (a) Presidential immunity and immunity of State officials, (b) immunity of the State before foreign courts; and (c) immunity of the State from certain court orders or legal consequences.

1.5.3 Presidential Immunity

The concept of Presidential immunity is closely associated with the immunity of the State. Sullivan rightly notes that “*state immunity and immunity rationale materiale enjoyed by heads of States are closely intertwined doctrines*”⁴. In the case of *Nixon v. Fitzgerald*,⁵ the United States (US) federal Supreme Court interpreted Presidential immunity as being ; ‘a functionally mandated incidence of the President’s unique office, rooted in the constitutional tradition of separation of powers and supported by the nation’s history...which extends to all acts within the outer perimeter of his duties of his office.’ In another case of *Clinton v. Jones*,⁶ the U.S Federal

² Black’s Law Dictionary Oxford University, (6th ed.1992) p164

³ The Oxford Companion to Law (Inter.Ed.), Oxford University Press

⁴ J.Sullivan Immunity versus Human Rights; The Pinochet Case. NYU Law journal, Vol 2(2002)

⁵ 357 U.S 731 (1982)

⁶ 520 U.S 681(1997)

Supreme Court stated that; *an official's absolute immunity should only extend to acts in performance of particular functions of his office because immunities are grounded in the nature of the functions performed, not the identity of the actor who performed it.* Thus, Presidential immunity is only restricted to acts performed in the official capacity or those acts deemed as incidental to official functions.

1.5.4 State Immunity before foreign Courts.

A sovereign State also enjoys Immunity with regard to litigation before foreign Courts. The general rule is that *a sovereign State could not be impleaded before the Courts of another State without its consent and this immunity used to be absolute for all acts done pursuant to sovereign function or jure imperii*⁷. However, this was later abandoned in favour of the modern practice of 'restrictive immunity'. According to Lord Denning in the *Trendtex Trading*⁸ case, *'restrictive immunity will apply to allow an applicant seek remedy in a foreign court unless the act of the State is that of the sovereign nature or jure imperii'*. The learned author Harris notes that, *'it is more in keeping with the dignity of a foreign sovereign to submit itself to the rule of law than to claim to be above it, and this independence is better ensured by accepting the decisions of Courts of acknowledged impartiality, than by arbitrarily rejecting their jurisdiction*⁹.' Thus, the concept of state immunity has many dimensions and its scope is quite wide, though circumscribed.

Due to lack of space however, this study will be confined to state immunity under the State Proceedings Act¹⁰. That is, the immunity of the State against certain court orders. But since the subject is closely intertwined, it will be difficult to avoid making reference to other areas of the concept, whenever necessary.

1.5.5 Rationale for immunity. - The rationale for granting state immunity is to allow the State to concentrate on the noble duty of providing essential goods and services to its citizens. That the State must be treated as an honest man and must be protected against unnecessary legal burden and liability which have the effect of derailing or slowing down normal functions of the State. As

⁷ The Porto Alexander (1920) p 30 CA

⁸ *Trendex Trading Corp. v. Central Bank of Nigeria* (1977) Q.B 529 CA

⁹ D.J.Harris, *Cases and Material on International Law*. Sweet & Maxwell (2004) at p 309

¹⁰ Chapter 71 of the Laws of Zambia

Wade notes when he justifies the basis of exemption accorded to the crown under the Crown Proceedings Act thus¹¹; “*the reason for exempting the crown from compulsory machinery of law enforcement is not to enable the crown flout the law, but it’s because the crown must, in public interest, be treated as an honest man, and ordinary laws must have their teeth drawn...nor can the crown be made the object of any injunction or order for specific performance or order for delivery up of property.*” It is stated elsewhere that; *‘the special nature of government, its legislative and executive processes and other considerations relevant to the way government generally functions, including its obligation to deal with limited resources in public interest are important considerations to be taken into account when determining the validity of the impugned section. Attachment of certain asserts would severely disrupt service delivery and would also unjustifiably limit the rights of many other individuals.*”¹²

Quite clearly, it is against the recognition that it will be highly prejudicial to public interest if litigants were allowed to proceed against the State in all manner, and obtain whatever orders against the State, unrestrained. It is against this background that the concept of state immunity is extended to State officials and instrumentalities. Motos also observes with regard to the Immunity enjoyed by judges that: *the immunity was not for the protection of malicious or corrupt judge, but for the benefit of the public whose interest it is that judges should be at liberty to exercise their functions with independence and without fear of consequences.*”¹³

It is clear from the rationale given above that the immunity granted to the State and State officials is highly circumscribed and can only be used as a defense within the prescribed confines.

1.5.6 Measures taken to limit state immunity.

The basis for the need to redefine the concept of State immunity arose because of the increased interaction between the citizenry and the State. This was upon the emergency of welfare state in 19th century. Wade notes thus; *‘the immense expansion of government activity from the latter part of the nineteenth century onwards made it intolerable for the government in the name of the crown to enjoy exemption from the ordinary law. The increased interaction between State and*

¹¹ Wade Op cit note 1 at p713

¹² Nyati v. Member of The Executive Council for the Department of Health, Gauteng and Others (2008ZACC 8).

¹³ J.Motos, Failing to Score: Clinton v. Jones 36 Havard Law Journal.

*the citizens also meant increased disputes, calling for litigation before courts of law*¹⁴. In essence, the State is today known as the worst violator of human rights. And in order to abate the violation of individual rights by the State it was desirable inter-alia that;

(a) the status of the State in litigation was reduced to equal that of other ordinary defendants in terms of civil liability and rights. This would subject the State to ordinary law.

(b) the law of the State vis-a vis individual human rights was codified by statute or put under the Constitution. This would establish and enumerate the fundamental rights of the individual,¹⁵ which the State was called upon to protect, respect and help fulfill. Consequently, any violation of these rights suffered by the individual at the hands of the State, was enforceable against the latter in terms the enforcement provision,¹⁶ usually existing within the Bill of Rights. Thus, creating a vertical relationship in terms of enforcement, as these rights are only enforceable as against State, not against any another ordinary individual.

1.5.7 (a) Reducing the status of the State in litigation

In the United Kingdom, the enactment of the Crown Proceedings Act was essential to achieving the objective of putting the crown in the same position as any ordinary litigant. As earlier stated, this was done in reaction to the recognition that, the state is today known as the worst violator of human rights. And this in turn gave rise to calls for limiting the immunity of the State and in other instance, total removal of State immunity has been achieved.¹⁷ Wade notes that *'in the United Kingdom, the passing of the Crown proceedings Act, meant in principle that, the crown is now in the position of an ordinary litigant. The rules which govern disputes involving the government and public authorities came before ordinary courts. And the courts so far as possible apply 'ordinary law', treating the crown as if it was a private individual with all the normal legal duties and liabilities except so far as modified by statute.'*¹⁸

Under the Crown Proceedings Act, the immunity has however been retained with regard to prohibition of injunction and specific performance (coercive reliefs), and the Court is prohibited

¹⁴ Wade note 1 at p697

¹⁵ Usually referred to as the Bill of Rights

¹⁶ Art.28 of the Zambian Constitution, also called the protective provision.

¹⁷ De Smith Judicial Review of Administrative Action (1968) Ltd 2nd Ed at p463,London.

¹⁸ Wade Op cit note 1 at p 31

from issuing these reliefs as against the crown. These features are also present under the Zambian Act.

1.5.8.0 The State Proceedings Act and immunity of the State under the Act.

In Zambia the object of the **State Proceedings Act**¹⁹ (hereinafter referred to as '**the Act**') is to provide for civil proceedings by and against the State and the civil liabilities and rights of the State and its servants; and for purposes connected with the aforesaid. The Act is fundamentally crafted in such a manner that it is on 'all fours' with the United Kingdom Crown Proceedings Act. This is discernable from the substantial similarities in the provisions. The provisions providing for immunity of the State against coercive reliefs, for instance,²⁰ are on all fours. To this end, the purpose of the Act is the same as that for which the Crown Proceeding Act was enacted. That is, to put the State in the same position of an ordinary defendant. This is also confirmed by the Court in the High Court case of *Walulya v. Attorney General*²¹ where the Court rightly noted that; '*s.16 of the State Proceedings Act is word for word taken from s.21 of the Crown Proceedings Act of 1947. The proviso of that section, which is also word for word as the proviso in our section*'. This is the immunity under the Act which is the subject of this research. And whenever the phrase 'immunity under the Act' is used in this research, such reference will be to this immunity under s.16 of the Act.

For purposes of the present discussion, the relevant provisions of the Act are **s.3** and **s.4** providing for the liability of the State in contract and tort, respectively. By virtue of these provisions of the Act, the State is subjected to ordinary contract/tort law like any other person with full contractual capacity, in terms of liability of a defendant to an action. But all enforcement must be carried out in terms of the Act which, inter alia, prohibits the Court from issuance of coercive reliefs as against the State and attachment of State assets.

The key section of the Act for purposes of State Immunity, and the theme of this research, is s.16 of the Act. This section relates to the nature of relief available to the applicant, as against the defendant State. This is the provision which prohibits the Court from granting injunctive relief against the State or attaching State assets in favour of an applicant in any proceeding to which

¹⁹ Chapter 71 of the Laws of Zambia

²⁰ S.21 and s.16 of the United Kingdom Act and the Zambia Act, respectively

²¹ (1980) Z.R 327 H.C

the State is a party. Thus, the Act immunizes the State by prohibiting the Court from issuing orders that have the effect of making the State an object of any injunction, order for specific performance or order for delivery up of property. Instead of these remedies, the Act states that the Courts may make a declaratory order of the rights of the parties; so that the plaintiff rights are merely pronounced upon as regards his entitlement against the defendant State. As the learned author Wade rightly notes in relation to s.21, the immunity provision under the U.K Act, '*instead of the orders of injunction, specific performance or compulsory orders, the Court merely makes a declaratory order so that the plaintiff's rights are recognized but not enforced*'²². Further, the Act uses the phrase 'Court shall not' connoting a mandatory compliance with the provision, on the part of the Court. This is the absolute immunity dictated by the Act

1.5.8.1 (b) Codification of the law of the State vis-a vis individual Human Rights.

The Zambian Constitution like most other written Constitutions contains a Bill of Rights. The purpose of providing for these rights as will be shown later, is to ensure that the State protects, promotes and fulfills these rights. And any person who feels that any of these protected rights have been violated in relation to him has a right to enforce the violated rights under **Art.28**, being the protective provision. Thus, **Art.28** is the protective provision empowering the Court to grant any appropriate relief to any person whose rights have been violated. The meaning of appropriate relief under Art.28 was construed to refer to effective redress²³. This means that the appropriate relief under Art.28 refers to any remedy, inclusive of interim or injunctive relief, that goes to restore or rectify the right(s) violated by the State. As already mentioned, these rights are only enforceable as against the State and thus, have a vertical application only.

Further, **Art. (1)3** of the Constitution provides that the Constitution is the supreme law of Zambia, and any law that is in conflict, is void to the extent of its inconsistency with the Constitution. And **Art.(1)4** binds all persons and all organs of the State at all levels. This means that every person and institution of the State is subject to the Constitution and bound by its provisions.

²² Wade Op cit note 1 at p 573

²³ Osatraco (U) Ltd v. The Attorney General HCCS 1380/1986 (unreported)

1.5.9 The Issue

What emerges from the foregoing is that; s.16 of the State Proceedings Act immunizes the State against interim reliefs, coercive orders and delivery of the property/attachment of State assets (prohibited reliefs), in an action to which the State is a defendant. The nature of prohibiting these reliefs under the Act takes a mandatory form, as seen from use the phrase '*Court shall not grant*', implying an absolute bar. Thus, by s.16 of the Act the Court is prohibited from issuing these prohibited reliefs, restricting the remedy to a declaratory order of the parties' rights in any proceeding to which the State is a defendant. And the Courts have complied with this restriction, as seen from recent case law, which will be reviewed shortly. On the other hand, Art.28 of the Constitution is the protective provision for the fundamental Rights under the Bill of Rights. This provision guarantees to an applicant, the right to enforce and obtain any appropriate relief, including coercive and interim reliefs, for any actual or threatened violation of the fundamental rights contained under Arts.11-26, inclusive. In interpreting s.16 of the Act vis-à-vis Art.28 the Courts have insisted that injunctive relief was not tenable in view of s.16 of the Act or under Art.28 of the Constitution. That an injunction is a prohibited form of relief under the s.16 of the Act and that Art.28 makes no provision for interim injunction. And that consequently, the Court has no power to grant an interim order or injunctive relief to an applicant. That under Art.28 Court should not by way of an interlocutory order, grant the relief before hearing and determining the matter.²⁴

However, a clear-headed understanding of Art.28 of the Constitution reviews that the whole essence of this provision is to guarantee to an applicant, any appropriate relief for purposes of redressing a violation of right(s) under the Bill of Rights. The phrase '*consider appropriate for the purpose of enforcing*' rights, clearly refers to any suitable relief which goes to redress the violated right(s). By this provision, the High Court is therefore given general power to safeguard the fundamental rights and grant any appropriate relief²⁵ to the deserving applicant. It is also noteworthy that, in undertaking this essential task of safeguarding the rights under the Bill of Rights, High Court must not be unnecessarily constricted by legalism as doing so will be going against the fundamental principle of human rights law that; '*human rights provisions must be*

²⁴ Law Association of Zambia v. The Attorney General (S.C.Z No.3 of 2008 Unreported)

²⁵ Including coercive orders and injunctive relief

*interpreted broadly and generously to give to the individuals, a full measure of their human rights.*²⁶ Should the Court sit by and leave a threatened violation or continued violation²⁷ unchecked merely because a lesser law imposes an absolute bar prohibiting Court from granting an interim relief that will stop the alleged violation until a final determination of the matter? Clearly this will be going against fundamental principle of supremacy of the Constitution,²⁸ and subordination of all persons before the Constitution.²⁹ Since Art.28 guarantees this adequate relief, it is arguable that it should not be an issue at what stage of proceedings the appropriate relief is granted. Or that mere timing should not be so overemphasized, as to prejudice or cause the deserving applicant to be deprived of his constitutionally guaranteed right to appropriate relief. To this extent, the question that begs for an answer is this; *Is the s.16 of the State Proceedings Act consistent with Art.28 of the Constitution?*

In interpreting the immunity provision vis-à-vis Art. 28, the High Court in the case of *Walulya*³⁰ held that the immunity against prohibited reliefs under s.16 is absolute. Further that, the nature of relief that the Court can grant under s.16 is an order declaring what the final rights of the parties are, and that such an order must necessarily be *res judicata* and bind the parties for ever, subject to appeal, only. A similar holding is seen in the recent case of *Law Association of Zambia v. Attorney General (LAZ case)*.³¹ In this case, the Court refused to make any pronouncement on the interface between the s.16 and Art.28, calling it an unnecessary academic exercise. The Court merely upheld the holding in the lower Court, that the restrictive order or injunctive relief that the applicant sought for in that case, was not tenable in view of s.16(1)(i)(ii) and 2 of the State Proceedings Act or under Art.28³². On basis of this interpretation, the courts have held that, there is therefore no provision for granting interim reliefs/orders under Art.28 of the Constitution. In the *UNIP case*³³ the Supreme Court held that, the High Court is bound, by inter alia, the substantive provision prohibiting coercive reliefs under s.16 and that an interlocutory injunction can not issue against the State. And further that, in view of s.16 of the Act, prohibited reliefs and interim reliefs are not among the remedies envisaged under Art.28. In short, the Courts in

²⁶ Anyangwe C. Introduction to Human Rights and International Humanitarian Law Unza Press, Lusaka at p222

²⁷ State violation of the fundamental rights under the Bill of Rights in a proper Constitutional case.

²⁸ Art.1(3) of the Constitution

²⁹ Art.1(4)

³⁰ *Walulya Op cit note 21*

³¹ S.C.J No- 3 (2008) unreported.

³² *Ibid* at p 31

³³ *Zambia National Holdings Limited and Another v. The Attorney General (1993-1994 ZR 115 SC) (UNIP case)*

Zambia have held that the immunity of the State under the Act is absolute in all instances. And the Courts have continued to interpret s.16 of the Act in this wholesale fashion, even when the issue for determination is the fundamental rights under the Bill of Rights. Whether this manner of interpreting human rights under the Constitution vis-à-vis other laws is consistent with the fundamental principles governing the interpretation of human rights is another big question that will to be addressed. Suffice to mention however, as will come shortly, that the foregoing manner of construing the immunity provision vis-à-vis the protective provision evidenced in the three cases above, is faulty. It is faulty because in all these cases, the Court was missing the point, namely to pronounce upon the interface between the two provisions. Erroneously, the Court construed each provision separately. The Court must always interpret Art.28 in light of Art.1(3) and 1(4). In the most recent LAZ case, the Court completely ignored to bring Art.1(3) and 1(4) in to view, contrary to the trite fundamental rule of constitutional construction seen in the case of *South Dakota v. North Carolina*³⁴. This manner of interpreting the two provisions also fails to meet the other requirement of constitutional construction which demands that it must be given '*a generous interpretation that avoids the austerity of tabulated legalism.*'³⁵ Further this manner of construing the two provisions is also tantamount to subordinating Art.28 of the Constitution to s.16 of the Act.

Thus, as the law in Zambia presently stands, the law will not come to the aid of an applicant who apprehends that the impending action of the State will violate any of his rights as established under the Bill of Rights.³⁶ More precisely, in its current state the law would not come to the aid of a petitioner who desperately needs an injunction, as in instances where he has been discriminated against,³⁷ or where the safety of his property,³⁸ or any of his other rights including the right to life as guaranteed under the Bill of Rights, is threatened by the perceived action by the State, the President or other public officer. The absence of injunctive relief is indeed a very gloomy state of affairs and will take centre stage in this study, because one wonders whether this was the intention of the framers of our Constitution.

³⁴ (192 US 268 1940) That all provisions of the Constitution bearing on a particular subject are to brought into view.

³⁵ Per Lord Wilberforce in *Minister of Home Affairs & Another v. Fisher & Another* [1980] AC 319 at p 328, Judgment of the Privy Council, in the Appeal from Court of Appeal of Bermuda

³⁶ *Walulya v. Attorney General* (1980 Z.R 327 H.C)

³⁷ LAZ case Op cit note 31

³⁸ UNIP case Op cit note 33

What ought to be borne in mind is that the Bill of Rights, as a constituent of the Constitution is a balanced component, in the sense that the individual rights are balance against permissible derogation allowing for a restriction to these rights. And the immunity of the State is one such permissible limitation. It therefore remains for the courts, to determine the operation of each of these factors depending on the facts in a particular case before the court. This research is therefore an attempt to arrive at a legally rational interpretation of s.16 of the State Proceedings Act (immunity provision) vis-à-vis Art.28, as read with Arts.1 (3) and 1(4) of the Constitution. It will undertake to interrogate the interface between the immunity provision³⁹ and the protective provision.⁴⁰ In so doing the research will attempt to answer the fundamental question; *Is s.16 of the State Proceedings Act consistent with Art.28 of the Constitution?*

³⁹ S.16 of the Act

⁴⁰ Art.28 of the Constitution, as read with Arts.1(3) and1(4)

THE STATE PROCEEDINGS ACT

The main objective of this Chapter is to bring out the provisions of the State Proceedings Act (The Act), that are relevant to the liability and immunity of the State under the Act. And to discuss the essence and implications of these provisions and other pertinent terms within these provisions, in light of existing case law, and publications of eminent jurists, in so far as is relevant to the present theme. This is important for purposes of laying a foundation for the discussions that will follow in the Chapters lying ahead.

2.0 The State Proceedings Act and immunity of the State under the Act.

In Zambia the object of the State Proceedings Act⁴¹ (hereinafter referred to as 'the Act') is to provide for civil proceedings by and against the State and the civil liabilities and rights of the State and its servants; and for purposes connected with the aforesaid. As noted in the preceding chapter, the Act is fundamentally crafted in such a manner that it is on 'all fours' with the United Kingdom (U.K) Crown Proceedings Act. For instance, the two Acts have identical provisions for the Immunity against coercive reliefs⁴². This is also confirmed by the Court in the High Court case of *Walulya v. Attorney General*⁴³ (*Walulya case*), when the Court rightly noted that; '*s.16 of the State Proceedings Act is word for word taken from s.21 of the Crown Proceedings Act of 1947. The proviso of that section which is also word for word as the proviso in our section*'.

Another similarity is seen with regard to the provisions subjecting the State to ordinary civil law, as other ordinary persons. The Crown/State is subjected to the same general liability in tort which it would bear if it were a private person of full age and capacity, the relevant provisions being s.2 and s.4 of the U.K and Zambian Act, respectively⁴⁴. In emphasizing the relegation of the State in tort, Wade notes that the Crown is also subjected to the normal rule of strict liability in *Ryland v. Fletcher*⁴⁵, for dangerous operations committed by its servants. To this end, it is

⁴¹ Chapter 71 of the Laws of Zambia

⁴² S.21 and s.16 of the U.K and Zambian Act respectively

⁴³ (1980) Z.R 327 H.C

⁴⁴ S.1 and s.3 of the U.K and Zambian Acts respectively deal with subjecting the State to ordinary law of contract, as if it were a private person of full contractual capacity.

⁴⁵ (1868)L.R 3H.L. 330

clear that the object of the Act is the same as that for which the Crown Proceeding Act was enacted. That is, to put the State in the same position as that of an ordinary defendant.

2.1 Relevant provisions of Act.

S.3 and s.4 of the Act serve to put the State in the position of an ordinary party to a proceeding. The first part of these provisions are quoted in the same manner, and read as follows;

S.3... the state shall be subject to those liabilities in contract to which, if it were a private person of full age and capacity, it would be subject and any claim arising therefrom may be enforced as of right against the state in accordance with this Act⁴⁶.

Quite clearly, the State is by virtue of s.3 and 4 subjected to ordinary contract and tort law, respectively, like any other person with full contractual capacity. S.16 of the Act which is also the main provision of the Act for purposes of State immunity, the theme of this research, relates to the nature of relief that an applicant is entitled to as against the defendant State. S.16 provides as follows; reveal

s.16 [1] In any civil proceeding by or against the State the Court shall subject to the provisions of this Act, have power to make all such order as it has power to make in proceeding between subjects and otherwise to give such appropriate relief as the case may require; provided that;

(i) where in any proceedings against the state any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and

(ii) in any proceedings against the state for the recovery of land or other property, the court shall not make an order for the recovery of the land or the delivery up of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the State to the land or property or to the possession thereof;

[2] the Court shall not in any civil proceedings grant any injunction or make any order against a public officer if the effect of granting the injunction or making the order would be to give any relief against the state which could not have been obtained in proceedings against the State.

⁴⁶ The same wording is seen under s.4 except that it relates to liability of the State in tort.

What clearly comes out of the preceding provision is that it immunizes the State by prohibiting the Court from issuing orders that have the effect of making the State an object of any injunction, order for specific performance or order for delivery up of property. Instead of these remedies, the Act only permits the courts to make a declaratory order of the rights of the parties. So that the plaintiff rights are merely pronounced upon as regards his entitlement against the defendant State. This is the immunity under the Act. Thus, contrary to the policy of putting the State in the same position as an ordinary party to a cause, the State still enjoys this immunity against coercive reliefs. Wade notes when he scorns at this immunity under the Act that; *'this is contrary to its policy of putting the Crown, far as possible, on the same footing as a private litigant.'*⁴⁷ But he later justifies the essence of the immunity when he notes that; *the Act exempts the Crown from the compulsory machinery of law enforcement... This is not to enable the Crown to flout the law, but because it would be unseemly if execution could be issued against government for failure to satisfy a judgment.*⁴⁸

Thus, the proviso under s.16 [1] (i) of the Act, prohibits Court from issuing orders of injunction and specific performance. And the Supreme Court upheld this proviso in the case of *Zambia National Holdings and Another v. Attorney General*⁴⁹ (UNIP Case). In restoring the proviso after it was earlier struck down by the High Court decision, the Supreme Court in this case merely stated that, *'the High Court was not exempt from adjudicating in accordance with the law including complying with...the types or choice of relief or remedy available to litigants under various laws or causes of action.'* Clearly, the Court here was affirming the immunity under the proviso. In the earlier High Court case of *Walulya*⁵⁰, Sakala.J as he then was, also upheld this immunity without any hesitation. In so doing, the learned judge held that *'This Court has no power to grant an injunction or make an order for specific performance against the State, but has power to make an order declaratory of the rights of the parties'*. And further that; *the nature of the declaration that Court can grant under, under s.16 (1), is a final declaration of the parties' rights, not an interim declaration'*.

⁴⁷ H.W.R Wade Administrative Law ELBS Oxford University Press (5th ed. 1986) at p 517

⁴⁸ Ibid p 713

⁴⁹ (1993-94) ZR 115 SC

⁵⁰ *Walulya v. Attorney General* 1980 ZR 327 HC

The learned author De Smith notes in this vein that, ‘...*the most unfortunate aspect of the present law is that it would seem that no interlocutory relief can be obtained to refrain any unlawful act done by the Crown or its servants acting in that behalf...*’⁵¹. Sadly though, this is the position adopted by the Courts in Zambia. In the *Walulya case* the Court was persuaded in affirming and adopting this principle by the holding seen in one English case.⁵² In that English case, the Court held that; ‘*s.21 (1) of the Crown Proceedings Act*⁵³, which empowers a Court to make a declaratory order against the Crown in lieu of an injunction, applied only to declaratory orders that are definitive of the rights of the parties; it does not empower a Court to make an interim declaration of rights, corresponding to the interlocutory injunction, against the Crown, and it is not the practice of the courts in any event to grant interim declarations.’ Sadly, this is the *ratio decidendi* adopted by the Court in the *Walulya case* when interpreting s.16 of the Act and Art.28 of the Constitution. On the basis of which the judge in upheld the immunity under s.16, stating that ‘s.16 only permits the Court to make a declaratory order of the parties’ rights, and that in terms of Art.28 such an order is a final order.’ It is submitted here that, the Court was missing the point when it made such an interpretation s.16 of the Act and the Art.28 of the Constitution. The issue did not call for such isolated interpretation of each of these two provisions, resulting in upholding the immunity in absolute terms. By upholding the immunity without any reservation, the Court was in essence subordinating Art.28 in relation to s.16. The issue that Court ought to have addressed in this matter is whether or not such an interpretation would have been done differently, in a proper Constitutional case, and only in relation to human rights under part III of the Constitution. That is, to pronounce upon the interface between the two provisions. This was not done. However, the judge in this *Walulya case* did in principle, accept the contention that in certain instances, an interlocutory remedy may issue when he affirmed the dictum of **Romer.J** in *Commissioner of Customs case*,⁵⁴ thus; *It may be - and this is the only reservation that I make - that, in certain cases, it is proper on a motion or on a summons under R.S.C. Ord. 25, r. 2, to make some declaration of rights on some interlocutory proceeding. That, however, is infrequent and should only be sparingly be exercised.*’ In light of the foregoing, two issues arise; Firstly, the judge in this *Walulya case* solely relied on English authorities where there is absence of a written

⁵¹ De Smith *Judicial Review of Administrative Action* (2nd Ed. Stevens & Sons Ltd London, 1986) at p 464

⁵² *International General Electric Co. of New York Ltd v. Commissioner of Customs and Excise*, [1979] 1 All E.R. 675.

⁵³ S. 21 of the English Crown Proceedings Act is on all fours with s.16 of the Zambian Act

⁵⁴ In *commissioner of Customs case*, note 52 at p678

Constitution. The case of Walulya rested, inter alia, on the *Right to Protection from Deprivation of Property*⁵⁵ and the *Right to Secure Protection of the Law*⁵⁶, as established under the Constitution. These are fundamental rights and freedoms contained under the Bill of Rights and enforceable in terms of **Art.28**⁵⁷ of the Constitution. It was therefore incumbent upon the Court to have taken into account the supremacy of provisions under a written Constitution over other laws⁵⁸, and the fundamental principles governing interpretation of human rights under the Bill of Rights. This is discussed in the next Chapter.

Secondly, the *Rules of the Supreme Court*⁵⁹ *Order 25, ruler 2*, which the Court in this Walulya case considered as special instances under which an interlocutory relief may be granted to the applicant are, though important, mere rules of procedure of the United Kingdom. Rule 2 of Order 25 of the R.S.C. of England is merely headed *-Duty to Consider all Matters*. These rules do not bind Zambian Courts, they are merely of persuasive value⁶⁰. In this *Walulya case*, the judge suggests that these rules are sufficient to change the position regarding the award of interim relief in Zambia. It is submitted that if rules of procedure from foreign jurisdictions which are of mere persuasive value are sufficient to change the position regarding awarding of interlocutory relief as the judge seem to suggest, then it follows that the fundamental human rights under the Bill of Rights, should equally be sufficient to warrant the issuance of the interlocutory relief to the deserving applicant. And therefore, the judge should have awarded this interlocutory relief sought by the applicant. Or he should have at least made a pronouncement on the interface between the two provisions, had he properly directed his mind to these two issues. Similarly, the Supreme Court in the *UNIP case*⁶¹ held that, the High Court is bound, by inter alia, the substantive provision prohibiting coercive reliefs under s.16 and that an interlocutory injunction cannot issue against the State. And further that, in view of s.16 of the Act, prohibited reliefs⁶² are not among the remedies envisaged under Art.28. Court arrived at the foregoing, without adequately addressing the issue of the interplay between the two provisions.

⁵⁵ Art.16 of the Constitution of Zambia Chapter 1 of the Laws of Zambia

⁵⁶ Art. 18 Ibid

⁵⁷ The Protective Provision under part III of the Constitution

⁵⁸ Art. 1(3) Supra note 15

⁵⁹ Of the Supreme Court Act (of England) 1981

⁶⁰ *The People v. Mmembe and Another* 1995 S.C.Z J No- 11 (1995)

⁶¹ *Zambia National Holdings and Another v. Attorney General* (1993-94) ZR 115 SC

⁶² Including interim injunctive reliefs

In the most recent case of *Attorney General v. Law Association of Zambia*⁶³ (LAZ case) the Supreme Court again, sadly though, evaded this issue in the applicant's submission in the cross appeal. That is, the Court did not make a pronouncement regarding the interface between s.16 of the Act and Art.28 of the Constitution. It merely stated that Art.28 makes no provision for interim reliefs. And that the restrictive order or injunctive relief sought by the applicant was not tenable in view of s.16 (1) (i) (ii) and 2 of the State Proceedings Act or under Art.28. It is strongly arguable that such blanket approach is tantamount to subordinating Art.28 of the Constitution to s.16 of the Act, and thus undermining the whole essence of a written Constitution, the supremacy provision⁶⁴. The argument presented to Court did not deserve construing the reliefs available under s.16 of the Act and under Art.28 separately, but to do so in a harmonious fashion. It was again wrong for the Court to construe Art.28 without bringing into view other relevant constitutional provisions⁶⁵ bearing on the same subject.⁶⁶ A proper construction of the interface between the immunity and protective provisions is particularly important in the jurisprudence of Zambia at this time. This is so because, it is possible that in a bid to protect fundamental rights and freedoms, it may be necessary to grant an injunctive relief to a petitioner who apprehends that his rights under part III, have been or are likely to be contravened by the acts of public officials or the State. It is in this vein that the arbitrary and wholesale application of the immunity provision in the U.K has received criticism and defiance by Court. As Lord Denning in *Bradbury v. Enfield L.B.*⁶⁷, asserts; '*The Courts are not deterred by the fact that an injunction against public authority is a particularly drastic step, bringing the machinery of Government to a halt. They do not lend a ready ear to pleas of administrative convenience. Even if chaos should result, still the law must be obeyed*'. Court of Appeal then proceeded to grant the interim injunction sought by the applicant, notwithstanding the existence of an express provision to the contrary.⁶⁸

The proviso under **s.16 (1) (ii)** of the Act prohibits Court from issuing orders against the State for recovery of land and delivery up of property. This proviso was also affirmed by the High Court

⁶³ (SCZ J No-3 /2008, unreported).

⁶⁴ Art1(3) of the Constitution, Chapter 1 of the Laws of Zambia.

⁶⁵ Art.1(3) and 1(4)

⁶⁶ *South Dakota v. North Carolina* 192 US 268 (1940)

⁶⁷ (1967) 1 WLR 1311

⁶⁸ Under s.21 of the Crown Proceedings Act (U.K Act)

in the *Walulya* case.⁶⁹ But in the in the recent case of the South African Constitutional Court,⁷⁰ the Courts struck down a similar provisions of their legislation to the extent that the provision was seen as being inconsistent with the Constitutions. In this case, the Courts based its decision to defy the mandatory requirement to comply with the immunity provision under the Act⁷¹ on the basis that the issues involved in the application were the fundamental rights under the Constitution.

The proviso under s.16 (2) of the Act prohibits the Court from issuing an injunctive relief against a public officer if the effect would be to issue a prohibited relief against the State. This proviso was also restated and affirmed in the case of *Walulya*⁷². In reference to the similar provision under the Crown Proceedings Act, the learned author De Smith notes that the effect of this provision appears to be to preclude the award of an injunction against is a Crown servant, for any act done in his official capacity⁷³. This interpretation is also seen in the earlier House of Lords case of *Glasgow Corporation v. Central London Board*⁷⁴. And in justifying this position with regard to the U.K Act, De Smith notes that; *the main policy reason for prohibiting this form of relief in the United Kingdom seems to be that in an emergency the Government might find it imperative to do unlawful acts that infringe individual rights, and that it might be highly detrimental to the public interest if the party aggrieved were to be able to obtain the immediate intervention of the courts.*⁷⁵ The emphasis here is whether or not, the act done by an agent of the State or its servant upon which an injunction is sought by the applicant, is one of sovereign nature, done in pursuance of pure functions of the State. In terms of this provision, where such act by the State official or agent is of sovereign nature, no injunctive relief could issue against such person. The rationale being that it is in public interest that the function of the State is not wantonly or unnecessarily interrupted. And by parity of reasoning in this vein, its officials could not be held accountable for their bona fide action done in pursuant of State duties or incidental thereto. So that no injunction should therefore lie against him, as this would be tantamount to

⁶⁹ *Walulya v. Attorney General* (1980) Z.R 327 H.C

⁷⁰ *Nyati v. Member of the Executive Council for The Department of Health and Others* CCT19/07 2008 ZACC

⁷¹ S.3 of the State Liabilities Act of South Africa

⁷² *Walulya* case Op cit note 69

⁷³ De Smith *Judicial Review of Administrative Action* (2nd Ed. Stevens & Sons Ltd London, 1986) at p 462

⁷⁴ 1956 S.C (H.L) 1

⁷⁵ Op cit De Smith note 73 at p463

injuncting the State/Crown. However, the House of Lords decision in *Liversidge v. Anderson*⁷⁶ is authority for the proposition that; ‘*if a Crown Servant personally commits or authorizes the commission of a tort, the plaintiff may sue him in his private capacity, notwithstanding that the act may have been done in the course of Crown duty.*’ This is also the position adopted in the renowned East African case of *Uganda v. Commissioner of Prisons, ex p. Matovu*⁷⁷.

2.2 Manner of Barring Prohibiting Reliefs under the Act.

In prohibiting Court from granting injunctive relief and/or specific performance under s.16 of the Act, the Act uses the phrase ‘Court *shall not grant*’. It is trite that the term ‘*shall*’ in statutory construction imports the peremptory or mandatory connotation. And since Courts often pay particular attention to the nature in which a statutory provision is couched,⁷⁸ the Courts have erroneously construed this absolute ban to apply even when the issue is human rights under the Bill of Rights. Consequently the Courts have therefore held that, in terms of the language under s.16 of the Act, coercive orders are an all-round prohibited form of relief against the State. This is the immunity under the Act which this research is intended to address, in relation to instances where the coercive relief is sought by the applicant on the basis that his rights under Bill of Rights have been or will be violated by the State, in terms of Art.28,⁷⁹ of the Constitution.

As noted earlier, whether the State should continue to enjoy this absolute immunity under the Act has been a subject of various interpretations. With the result that, some jurisdictions are thriving towards abolishing the immunity, while others have completely done away with this absolute immunity. As the learned author De Smith rightly notes when he demonstrates that there is a growing trend towards eliminating State immunity against coercive orders thus; In a number of jurisdictions, injunctions may be awarded against government, in South Africa interdicts lie against the State. In Australia, injunctions may be issued against government and officers of the Crown. In Canada, it appears that they may, in certain circumstances, issue against the Crown Servants. Further that, in India injunctions may issue against government and their

⁷⁶ [1942] A.C 206

⁷⁷ [1966] E.A 514

⁷⁸ *Miyanda v. Handahu* (S.C.Z Judgment No- 5 of 1994 unreported) The Court held that ‘the Court’s duty is to find out the expressed intention of the legislature.’

⁷⁹ The protective provision, under the Constitution of Zambia, Chapter 1.

officers. In reference to the United States, he notes that public officers may be enjoined.⁸⁰ But in Zambia the State has continued to enjoy absolute immunity as confirmed by recent Supreme Court decisions.⁸¹

2.3.1 Declaration: *Origin, Nature and Virtues of the Declaratory Order*

Under the Act the only relief available to the applicant is the declaratory order⁸². The history of the declaratory judgment ... is almost certainly of equitable origin and was originally available in Chancery Court only when the plaintiff sought, in addition to the declaration, some other consequential relief, but since 1884, this has been no longer necessary though additional relief often does accompany the declaration.⁸³

The declaratory order is useful in several instances and its virtues have in fact been well celebrated, as seen in the case of *Spettabile Consorzio Vene Ziano di, Ermamento e Navigazione v. Northumberland Shipbuilding Co*⁸⁴, where Lord Atkin noted thus; '*a declaratory judgment is one of the most valuable contribution that the courts have made to the commercial life of Britain.*' Thus, the declaratory order originated from the Courts and that it is a very useful remedy. And that initially, all applications for a declaration would always sought in addition to some other consequential relief.

2.3.1.2 *Limitations in the nature of a declaratory judgment.*

Though very useful as seen in the preceding paragraph, the declaration is fraught with serious limitation. And it may be proper to discern that this could probably be the main reason why the order was historically sought, in addition to other consequential reliefs. The inadequacy of the declaratory order becomes more manifest when the issue for which the order is granted is for purposes of redressing the human rights, which have been violated in terms of Art.28. As Nwabueze rightly notes; '*there is the limitation inherent in the nature of a declaratory judgment. Its function is to declare legal relations as they exist, not to constitute new ones. A declaration states the rights of the parties without making reference to how the declared rights are to be*

⁸⁰ Op cit De Smith note 73at 463

⁸¹ Zambia National Holdings and Another v. Attorney General (1993-94) ZR 115 SC, and also in Law Association of Zambia v. Attorney General (LAZ case) S.C.J No- 3 (2008) unreported.

⁸² S.16 of the Act

⁸³ C.K Allen Law in the Making 7th Ed Clarendon Press Oxford (1983) p79

⁸⁴ 1919 121 L.T at 635

enforced. It is therefore clear that a declaration of invalidity would leave the impugned decision or act still in existence, side by side with the Court's declaration.'⁸⁵ It is noted elsewhere that 'a declaratory order [of proprietorship of property] leaves a successful party at the mercy of Government functionaries as to when he is to enjoy the fruits of a successful action against government. For a declaratory order cannot be enforced...'⁸⁶ Thus, a declaratory order may not be adequate for purposes of redressing a violated right under the Bill of Rights.

2.4 Whether the immunity under s.16 of the Act falls within permissible Limitations to the Bill of Rights.

Before assessing whether the immunity under s.16 is a permissible limitation to the Bill of Rights, this part begins by briefly looking Art.28 and investigating whether the protective provision guarantees a *fundamental right to appropriate relief*, to the applicant.

Art.28 exists for purposes of permitting the applicant to enforce any of his fundamental rights under the Bill of Rights, Arts. 11 – 26 inclusive. In this sense, Art. 28 is cardinal to the enjoyment of these rights, to an extent that these rights will be worthless in the absence of this enforcement provision. As the learned authors Kapur and Misra rightly note in relation to the Constitution of India thus: '*...a right without a remedy is a meaningless formality...; the remedies provided under the enforcement provision are the heart and soul of the Constitution*'.⁸⁷ Therefore, the right under Art. 28 is an appendage to the fundamental rights and freedoms under Arts.11 – 26 inclusive, and is itself seen as to a fundamental right. And Kapur and Misra rightly note thus; The Right to move the Supreme Court for the enforcement is itself a guaranteed right under the enforcement provision.⁸⁸ The right to enforce under the protective provision is a means to obtaining appropriate relief, and an applicant who moves the Court under Art.28 is in effect therefore, exercising his *guaranteed right to appropriate relief* for a violation of a right under the Bill of Rights. Consequently, a denial of appropriate relief under Art.28 is a violation of a fundamental right to appropriate relief.

Under the Bill of Rights the immunity of the State is not expressly stated as a permissible derogation. In assessing whether the immunity under s.16 of the Act is a permissible limitation to

⁸⁵ B.O Nwabueze *Judicialism in Commonwealth Africa* at p123

⁸⁶ *Osatraco (U) Limited v. The Attorney General HCCS 1380/1986* (unreported)

⁸⁷ Kapur and Misra *Select Constitutions Chand & company New Delhi, (2005)India* p 108

⁸⁸ *Ibid* p 108

the Bill of Rights, the issue to be addressed is; -Whether the limitation (immunity) falls within the laws under the category of *-reasonably required in public interest* and/or *justifiable*. Apart from the derogation expressly stated within the Bill of Rights, other permissible derogation are those falling in the categories of derogation required in *public interest*, for *public security*, *public health*, etc. For a law to qualify as a derogation falling within the category of laws required in public interest the Courts will look, inter alia, at whether it is in the interest of the majority that such law should be maintained. And whether in the absence of that law, the rights or interest of others will thereby be infringed or prejudiced.⁸⁹ In assessing the legitimacy of such law the test applied is the principle of *proportionality*.⁹⁰ This principle looks at - *Whether that limitation serves a legitimate and acceptable purpose to the general public; and whether there is sufficient proportionality between the harm done by the legislation to the applicant's right(s), and the common good sought to be achieved.*⁹¹ And where the common good sought to be achieved outweighs the harm done to the applicant's right(s), that law is said to be legitimate and reasonably required in public interest. Thus, the benefit to the State for the sake of justifying public good arising from application of that infringing law, must not result in grave or severe harm done to the applicant's fundamental rights under the Constitution. Applying this test to our current theme, reveals that the immunity under s.16 of the Act is justifiable, to the extent that its purpose is to ensure that the State machinery meant for providing public services is not disrupted. The rationale being that it is clearly in the interest of the public that there is no indiscriminate issuance of injunctive relief and/or attachment orders against the State⁹². And that allowing the issuance of these prohibited reliefs will unjustifiably limit the rights of others. Further the test or standard required to justify existence of such law according to the Court in the *Kachasu v. Attorney General*⁹³ case, is that such law does *not have to be necessarily required* or even *urgently required*- it has only to be *reasonably required*. Thus, standard that such law must meet is not high, but the relatively modest.

The law said to reasonably justifiable on the basis that it is required in the interest of the public must not, in a proper constitutional case, be excessive or allowed to severely infringe the

⁸⁹ Nyati v. Member of the Executive Council and Others (Nyati case) CCT 19/07 2008 ZACC

⁹⁰ Beyani. C International Law and the lawfulness of Derogations from Human Rights During States of Emergency in Zambia. Zambia Law Journal, UNZA, S.Ed ISSN 1027-7862 at p 113

⁹¹ De Waal and Currie The Bill of Rights Handbook 5th Ed (Juta Cape Town 2005)

⁹² H.W.R Wade Administrative Law ELBS Oxford University Press (5th ed. 1986) at p 713

⁹³ (1967) Z.R. 145 (H.C)

guaranteed rights and freedoms under the Bill of Rights.⁹⁴ In essence value to public interest is balance against the value to individual human rights under the Bill of Rights, in a particular case. To this extent, the only way in which a law will be upheld as required in public interest in a particular case, despite infringing the rights under the Bill of Rights is by way of *selective or appropriate* application of such law. So that in a proper Constitutional case the operation of such a law must be frozen or suspended. And only applied in absolute terms, in cases where there will be little or no harm inflicted on the rights of the applicant. Therefore, where there is an impending or continued violation of the applicant's right by the State, the interim relief must be granted as of right, pursuant to the right to appropriate under the protective provision.⁹⁵

This foregoing brings us to the *proportionality test* seen in the Tanzanian Court of Appeal case of *Pumbun & Another v. Attorney General & Another*.⁹⁶ In stating the requirements that a restriction to the fundamental rights must meet in order to be legitimate, the Court stated *inter alia* that, *such law must not be more than is reasonably necessary to achieve the legitimate object. That such law must not be drafted too widely so as to net everyone including even the untargeted members of society.* And further that, *any law that seeks to limit fundamental rights of the individual must be construed strictly.*

Applying this test to the immunity provision under the Act reveals that, the only way the immunity will be consistent with Art.28 as read with Arts. 1(3), 1(4) is when this immunity is restrictively applied, in suitable cases, depending on the nature and merit of the case in issue. Thus, notwithstanding that the immunity under the Act is quoted in mandatory terms and is perfectly justifiable in public interest; it must be narrowly construed in a proper Constitutional case. To this end, the immunity under the Act will only be reasonably required in public interest and justifiable to the extent that it is not applied in absolute terms in all instances. Nor should the immunity be applied in a wholesale fashion as to net even the untargeted members of society. The untargeted members in this case being applicants who have a proper constitutional case in terms of Art.28. This way, the immunity provision will be meeting the test of only *achieving the legitimate object*. This legitimate object being, the prevention of indiscriminate or unwarranted interim reliefs, that unnecessary put the functions of the State in jeopardy.

⁹⁴ *Osatraco (U) v. Attorney General HCCS 1380/1986*

⁹⁵ *Rwanyarare and Others v. The Attorney General (Constitutional Application No. 6 of 2002 unreported)*

⁹⁶ (1993) 2 LRC 317

On basis of the foregoing analysis, it is submitted that although the immunity under the Act falls within permissible limitation to the rights under the Bill of Rights, it must be relaxed or construed restrictively, in a proper case. What is termed as *restrictive immunity*.⁹⁷ In fact, the very ground of 'required in public interest' would no longer be sustained, where the immunity is applied in absolute terms and without any qualification. Applying the immunity provision in absolute terms, waters down the very essence of the rights under the Bill of Rights.⁹⁸ Further, it is this wholesale application⁹⁹ of the immunity under the Act, that has led Courts to strike down the immunity provision in some jurisdictions.¹⁰⁰ The reason for striking down the infringing legislation by Courts has been that, the lesser law though reasonably required was inconsistent with the supremacy provision. In terms of the rights under the Bill of Rights, the reason for this, as will be seen in the next Chapter, is that the rights under part III carry an imperative connotation and enjoy a status of presumptive inviolability. To this extent any law importing a restriction to full enjoyment is critically scrutinised or reviewed.¹⁰¹

⁹⁷ Lord Denning in the *Trendex Trading Corp v. Central Bank of Nigeria* (1977) Q.B 529

⁹⁸ The absolute immunity approach would undermine the Supremacy provision under Art.1(3) of the Constitution.

⁹⁹ *Mulundika and Others v. The People* (1995) S.C.Z Judgment No 25

¹⁰⁰ Nyati case note 89

¹⁰¹ *Pumbun & Another v. Attorney General and Another* (1993) 2 LRC 317

THE FUNDAMENTAL HUMAN RIGHTS UNDER THE CONSTITUTION

This chapter is directed at addressing the issue of human rights under the part III of the Constitution or the Bill of Rights. It will address inter alia the *nature, limitation, violation* and *enforcement* of human rights, and the *interpretation* of these fundamental human rights.

3.0 Interpretation of the Constitution- at a glance. -The Constitution is a special type of document designed to stand the test of time. It is the supreme law of the land, a living document containing statements of great breadth and generality. To this end constitutional interpretation, unlike ordinary legislation, calls for different considerations. It is thus a legal document (*sui generis*) of its own unique character, the interpretation of which is governed by special rules. These special rules include, inter alia that, Court must take into consideration, ‘the purposes which were intended to be achieved by the Constitution as a continuing instrument of government.’¹⁰² And also ‘the fact of the evolving development, and the just demands and aspirations of the people,’¹⁰³ as contained in the Constitution.

3.1 Fundamental Human Rights and Freedoms- Nature and origin.

In the contemporary world, many countries with written constitutions desire that the rights which are deemed basic or fundamental¹⁰⁴ to a particular nation are clearly stated and established under the Constitution. The rationale being that, these rights must be protected as guaranteed human rights and freedoms, of the individual. These rights are guaranteed to the citizens, under the Constitution and are enforceable only against the State. In this sense, they are said to have a vertical application only. And the nature of protection sought, is that the State should not violate these rights. And where such violation is detected, the State violator should provide redress.

The idea of a Bill of Rights incorporated in the Zambian Constitution is a British colonial legacy, that is also evident in other former British colonies which include inter alia Uganda, Nigeria and

¹⁰² US v. Classic, 313 US 299 1941 at p.316

¹⁰³ C.Anyangwe An Outline of the study of Jurisprudence Unza 2005 at p.101

¹⁰⁴ Mainly in the class of Civil and Political Rights as set forth in Articles 2 – 21 of the Universal Declaration of Human Rights.

India. And the observation by Lord Wilberforce, with regard to the Constitution of Bermuda¹⁰⁵ is authority for this proposition when the law lord notes thus;

'Chapter 1 is headed 'protection of fundamental rights and freedoms of the individual. It is known that this chapter, as similar portions of other constitutional instruments drafted in the post-colonial period, starting with the Constitution of Nigeria..., was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms. That Convention was in turn influenced by the United Nations Universal Declaration of Human Rights of 1948'.¹⁰⁶ Thus, Britain implanted human rights norms in the European Convention to which it was a member, into the Constitutions of its colonial territories, including Zambia. Further to the foregoing, it is important to note that the major difference between the American Bill of Rights (also known as First Amendment) and the Bill of Rights in former British colonial territories is that; in the former there is absence of the enforcement provision within the American Bill of Rights, whereas the latter countries have an enforcement provision, existing within the Bill of Rights. However, the enumerated rights in these Bill of Rights are by and large, the same.

It is expected that citizens freely exercise or enjoy these rights without hindrance, abridgment, obstruction or intervention by the State. As Anyangwe rightly notes; the state is duty-bound, both under international and national human rights law, to respect, protect, promote and help fulfill fundamental human rights and freedoms.¹⁰⁷ These rights are seen as an essential attribute, if man is to make any useful contribution in the democratic society. According to Anyangwe; *the word 'fundamental' means central, primary or basic. A right is fundamental if it forms the basis of other rights. Fundamental human rights form the basis of other rights and freedoms¹⁰⁸.* Citizens do not require a permit to exercise these rights¹⁰⁹ and these rights are beyond State regulation whether through enactment of law or otherwise, and enjoy a prima facie presumptive inviolability.¹¹⁰

¹⁰⁵ A former British colony, also.

¹⁰⁶ Minister of Home Affairs and Another v. Fisher and Another (Privy council) 1980 AC 319

¹⁰⁷ C. Anyangwe Introduction to Human Rights and International Humanitarian Law (Unza, Lusaka, 2004) at p 207

¹⁰⁸ Ibid at p3

¹⁰⁹ Mulundika and Others v. The People (1995-1997) Z.R p20

¹¹⁰ Anyangwe Op cit note 107 at p 3

3.1.2 Bill of Rights.- In Zambia these rights are contained under part III of the Constitution as the Bill of Rights, Arts. 11-26, inclusive. The Bill of Rights is a tangible list of rights and freedoms guaranteed to the Zambian people. These rights are so fundamental to the dignity and worth of the people in that other important human values depend on them.¹¹¹ The Zambian Bill of Rights is an entrenched provision under part III of the Constitution. In essence, the whole rationale of having these rights established under the Constitution is that the State shall recognize, promote, protect and help the citizens fulfill these rights. In order to prevent alteration by the legislature, the continued existence of these fundamental rights and freedoms under the Constitution is guaranteed in three main ways as follows;

Firstly, by the principle of *supremacy* of the Constitution, over other laws, as provided for under Art.1(3). This supremacy provision empowers the Courts to quash any legislation that is in conflict with the Constitution.¹¹² The learned Author Diaz notes to this effect thus; '*Among the factors that contribute to the spot-lighting of the American judiciary is the check imposed upon legislative power by the American Constitution. The judges interpret the Constitution and have power to quash legislation in conflict with it.*'¹¹³ Secondly, and more specifically, part III of the Constitution is an entrenched part of the Constitution, in the sense that it can only be altered in terms of Art.79. This provision requires that a referendum must be held, in order to alter or amend any part of the Bill of Rights. The net effect of this requirement is that the legislature cannot amend any part of the Bill of Rights without the consent of the people. In support of this rule Anyangwe notes that '*Parliament being a creature of the Constitution...may not pass any Act purporting to derogate from the Constitution, other than in terms of Art.79 of the Constitution.*'¹¹⁴ Thirdly, by binding all persons and organs of the State at all levels in terms of Art.1(4) no one is exempted from the effect of these provisions. Thus Constitutional provisions reign supreme and are inviolable by persons and or organ of the State. Thus, sufficient mechanism exists within the Constitution to ensure that the Bill of Rights is secured from political controversy.

¹¹¹ Ibid Anyangwe at p3

¹¹² Mumba v. The People (1984 Z.R 38 HC) and also Mulundika case Op cit note 8

¹¹³ Dias Jurisprudence (5th Ed. Butterworth London 1985 at p 448)

¹¹⁴ Anyangwe, The Zambian Constitution and the Principles of Constitutional Autochthony and Supremacy ISSN 1027-7862, Zambia Law Journal, p15.

3.1.3 Normative Status of the Bill of Rights under the Constitution.

These rights under the Bill of Rights enjoy a higher normative status than norms outside the Constitution. As Anyangwe rightly notes in relation to the supremacy of the Constitution generally thus; *Constitutions express the positivisation of higher values... They contain a selection of the most important legal rules that govern the government and usually have some priority over other legal rule.*¹¹⁵ The Bill of Rights is seen as inviolable and hierarchically superior to other norms. In this vein Lord Lloyd who was part of the Working Group¹¹⁶ defined the Bill of Rights as “ a constitutional code of Human rights that is binding in law, is generally worded and has certain basic characteristics including that; (a) The code should be given some sort of overriding authority over other laws.’

And because they enjoy a higher status and are binding on the State, these rights are sometimes referred to as peremptory norms. As Janda rightly notes; the freedoms protected in the Bill of Rights today apply as limitations on the states¹¹⁷. In the same vein, the learned authors of the book *Select Constitutions*¹¹⁸ rightly note with regard to the Bill of Rights under the Indian Constitution, thus; ‘*the fundamental Rights place a limitation on all kinds of authority that has either the power to make laws or have discretion vested in it.*’ To this extent, it is clear that no lesser norm justifies infringement of rights under part III except in terms of the permissible derogations stated within the Bill of Rights. The basic characteristics of the human rights under the Bill of Rights is therefore that, as source of law these rights override any other rule which does not have the same status. However, ‘*unless there is an express provision in the Constitution with which the Act of a Legislature conflicts, it cannot be held to be void, merely on grounds of its being inconsistent with what the Court considers to be the spirit of the Constitution.*’¹¹⁹ Thus,

¹¹⁵ Anyangwe, *The Zambian Constitution and the Principles of Constitutional Autochthony and Supremacy* ISSN 1027-7862, *Zambia Law Journal*, p15.

¹¹⁶ Report of an Interdepartmental Working Group concerning Legislation on Human Rights- European Convention 1976-77 House of Lords. 81

¹¹⁷ Janda, Berry, Goldman and Hula: *The Challenge of Democracy* 5th Ed. Houghton Mifflin Company 2004 p288

¹¹⁸ Kapur and Misra *Select Constitutions* Chand & company New Delhi, (2005) India, p94

¹¹⁹ *Gopalan v. State of Madras* 1950 S.C. J p198 Indian Supreme Court.

an applicant must point to the particular right under the Bill of Rights that has allegedly been violated in relation to him.¹²⁰

.3.2 Limitations to the Rights under the Bill of Rights.

As already stated the role of the State is to ensure that individual citizens continue to exercise and enjoy the human rights under the Bill of rights, without unnecessary hindrance. These rights may be bridged only in accordance with the strictly limited permissible limitations.¹²¹ This means that no derogation not expressly permitted must be read into these rights. It is in this sense that Lord Diplock noted that, *the limits within which the executive may impose restraint on citizens' rights without any statutory authority, are now well settled and incapable of expansion.*¹²² Thus the only instances under which the State can legally limit the free exercise or enjoyment of these fundamental human rights, are instances stated within the Bill of Rights. In the case of *Mulundika* the Supreme Court held that *the citizens freedoms may be restricted by law on the grounds stated in the Constitution but they cannot be denied. Any such denial will be unconstitutional and void.*¹²³

It becomes important again to revisit the question; *On what basis are laws such as s.16 permissible?* Art.11 starts by introducing the general categories of these fundamental rights upon which it states thus; *...the provisions of this Part shall have effect for affording protection to those rights and freedoms subject to limitations of that protection as are contained in this Part, being limitations designed to ensure that the enjoyment of the said right and freedoms...does not prejudice the rights and freedoms of others and public interest.* Thus, the Court has a duty to strike a balance between affirming that the applicants rights have been violated, and to ensure that the rights of others and public interest are not thereby prejudiced. As the Working Group¹²⁴ rightly noted *'a Bill of rights would not necessarily hamper strong, effective and democratic government because it could recognize that interference with certain rights be justifiable if they*

¹²⁰ In *Attorney General v. Law Association of Zambia (LAZ case)* [SCJ No-3 2008] The application alleged that his right not to be discriminated against, had been violated in terms of Art.23 of the Constitution.

¹²¹ Anyanwe Introduction to Human Rights and International Humanitarian Law (Unza, Lusaka,2004) at p 3

¹²² *BBC v. Johns* (1965) Ch 32,79

¹²³ *Mulundika and Others v. The People* (1995-1997) ZR p20

¹²⁴ Report of an Interdepartmental Working Goup concerning Legislation on Human Rights European Convention 1976-77 House of Lords p81

were necessary in democratic society, in for example, the interest of national security, public interest, prevention of a disorder, among others’.

It is upon this foregoing basis that the operation of certain laws such as the immunity of the State under s.16 of the Act, are justified. The rule being that where no derogation is expressly provided for, under a right in the Bill of Rights, the State shall not read any claw-back clauses into that right. As Anyangwe note thus; *the list of permissible limitations in a Bill of Rights must be taken as exhaustive not as indicative.*¹²⁵ For instance, there should be no circumstance under which a derogation should be read into Arts.14 and Art.15.¹²⁶ This is because the Constitution itself does not provide for any derogation to these rights. In *State v. Zuma*¹²⁷, the Constitutional Court of South Africa held that, *constitutional rights conferred without express limitations should not be cut down by reading implicit restrictions into them, so as to bring them into line with common law.*’ The basic principle being that ‘*human rights provisions must be interpreted broadly and generously to give to individual a full measure of their human rights.*¹²⁸To this end, *any law that seeks to limit fundamental rights of the individual must be construed strictly.*¹²⁹

3.3 Violation and Enforcement of Fundamental Human Rights and Freedoms.

(a)-Violation- In order to give effect to human rights under the Bill of Rights, the Court has to interpret whether any of the right(s) have been violated and to give a relief where such has taken place, in terms of **Art.28.**¹³⁰ This is so because ‘a mere incorporation of human rights in a Constitution does not *ipso facto* mean that those rights have been protected’.¹³¹ The role of the Court is thus, very important in the process of construing a violation and granting relief. And because of the importance of the rights under the Bill of Rights, there is a unique mode of assessing existence of a violation. Accordingly ‘*any encroachment on human rights, no matter how seemingly trivial must be guarded against.*¹³² As the Constitutional Court of South Africa rightly observes in the Nyati case; *In a State that has pledged itself to redeem the dignity of its*

¹²⁵ Anyangwe Op cit note 20 at p 222

¹²⁶ Protection from Slavery and Forced Labour and Protection from Inhuman Treatment, respectively

¹²⁷ 1995 (4) BCLR 401 (SA) 411

¹²⁸ Anyanwe Introduction to Human Rights and International Humanitarian Law (Unza, Lusaka,2004) at 222

¹²⁹ Mulundika case Op cit note 22

¹³⁰ The enforcement provision

¹³¹ Anyangwe Op cit note 128 p205

¹³² Anyangwe Ibid note 128 at p222

citizens, it should not be the State itself that tramples on the rights of its citizens.¹³³ And for an act to constitute a violation of the rights it need not be substantial in nature.¹³⁴ In this sense a mere postponement of enjoyment of a right, by requiring that a prior permit is obtained amounts to an infringement.¹³⁵

In the *Nyati case* the Constitutional Court adopted a dynamic test for assessing the existence of a violation. The Court held that, *'when considering the legitimacy of a limitation, the Court places the purpose, effect and importance of the infringing legislation on the one side of the scale, and the nature and effect of the infringement on the other. And that the more substantial the inroad into the fundamental rights, the more persuasive the grounds of justification must be'*.¹³⁶ Clearly, while recognizing the existence of infringing laws, the Constitutional Court insisted that such infringement must be justified. Another strict approach against violation of human rights was seen in the Indian case of *Emmanuel v. State of Kerala*¹³⁷. This case involved Watch Tower student expelled from school for not singing the National Anthem. The Supreme Court of India noted that *'the test to be applied is that the state legislation or act complained of must be examined to discover whether such an act is authorized by law. And whether, it is genuinely meant to ensure that the functions of the State are not put in jeopardy.'* The foregoing attests to the rule that any law or act that has the effect of cutting down on rights under part III must be narrowly construed.¹³⁸ On permissible derogations, the Supreme Court in the *Mulundika case*¹³⁹ noted that although the *freedoms under the Constitution are not absolute, they should only be regulated but not abridged or denied, and that, 'a citizen's freedoms under the Constitution may be restricted by law on the grounds stated in within the Constitution itself but cannot be denied.'*¹⁴⁰

To this end it is safe to conclude that unlike the violation associated with other tortuous or contractual rights, where the fundamental human rights are in issue, the question is whether the right has been denied or merely regulated. The former is a violation and the latter may not be a

¹³³ *Nyati v. Member of the Executive Council for the Department of Health Gauteng and Ors (CCT 2008 ZACC)*

¹³⁴ *Demja njuk Op cit note 12*

¹³⁵ *Mulundika Op cit note 22*

¹³⁶ *Nyati' case Op cit note 133 at p 30*

¹³⁷ A.I.R 1952 S.C 252

¹³⁸ *Mulundika case at p20*

¹³⁹ *Ibid*

¹⁴⁰ *Patriotic Party v. Inspector General of Police (Writ No 4 of 1993, Supreme Court of Ghana)*

violation if it falls within the permissible derogations. The bottom-line being that a person's right is violated, even where there is a slightest degree of hindrance to his full enjoyment of the right.¹⁴¹ To this end, the question that needs to be addressed is; *How does a person enforce a right under the Bill of Rights that has violated in relation to him?*

(b) -Enforcement of Fundamental Rights and Freedoms.

A Bill of Rights is not an automatic guarantee of liberty, its effectiveness depends on the integrity of the institution which apply it...¹⁴² Conscious of the fundamental nature of the human rights under part III, the framers of the Constitution desired that, the enforcement mechanism must be located within part III of the Constitution. After setting out what at the moment is considered as the elaborate declaration of human rights under Arts. 11-26, of the Constitution, the framers included Art.28 as the provision for enforcing any violation to these rights.

Art. 28(1)¹⁴³ reads;

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

(a)Hear and determine any such application

*(b)Determine any question arising in the case of any person which is referred to it...;
and which may, make such order, issue such writs and give such direction as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of Articles 11 to 26 inclusive.*

Thus, Art.28 exist for the sole purposes of allowing the individual to enforce the right violated or likely to be violated in relation to him. Art.28 of the Zambian Constitution is the enforcement provision allowing an applicant, and in terms of the *Protection of Fundamental Rights Rules*¹⁴⁴, to petition the High Court seeking relief for the rights violated in relation to him. And it is the

¹⁴¹ *Kachasu v. Attorney General* (1967 Z.R 145 HC)

¹⁴² Working Group Op cit note 23

¹⁴³ Constitution of Zambia, Chapter 1 of the laws of Zambia

¹⁴⁴ Statutory Instrument No- 156 (1969).

function of the Court to give an interpretation that gives effect to the intention of the framers. Since the State contracts not to breach these individual rights, the trite rule that, 'a breach of an engagement entails an obligation on the part of the defaulting party to make adequate reparation by way of providing redress for the injury caused,'¹⁴⁵ applies. Further, the acceptance of these rights under part III as being of higher value entails that, '*a State allegedly violating these norms cannot invoke hierarchically lower norms to avoid the consequences of the illegality of its actions.*'¹⁴⁶ Thus the State cannot rely on a lesser law as a defence to justify the violation of the human rights under the Bill of Rights, unless that law, inter alia, falls within permissible derogations.

Similar protective provisions to Art.28 of the Zambian Constitution are also seen under the Indian and South African Constitutions.¹⁴⁷ In affirming that the right to move the Court for enforcement is itself a fundamental right, the learned authors¹⁴⁸ note with regard to Art.32 of the Indian Constitution thus; '*one of the important features of the fundamental rights is that there is a special constitutional provision for their enforcement. The right to move the Supreme Court for the enforcement is itself a guaranteed right under Art.32.* In distinguishing the American Bill of Rights where there is no enforcement provision, the learned author Nwabueze notes that the; *Commonwealth African Bill of Rights mark a significant advance from the American, in that they guarantee access to the court, by means of a simple application, for the enforcement of the rights they guarantee...*'¹⁴⁹ To this extent, the enforcement provision primarily serve to ensure that State interference to the free enjoyment of the rights under the Bill of Rights, is strictly confined to the permissible derogations. And where there is a violation the applicant can invoke Art.28 to seek and obtain *any remedy appropriate to enforce the violated right(s).*

The question that needs to be addressed in relation to the current theme is; *What is the meaning of appropriate relief under Art.28?* The meaning of the word *appropriate* is that it is synonymous to the words; *correct, proper, befitting or suitable.*¹⁵⁰ In the Ugandan case of

¹⁴⁵ Reparation for Injuries suffered in the Service of United Nations (Reparation case) (I.C.J. Rep. 1949)

¹⁴⁶ Al- Adsan v. United Kingdom (2001) 34 E.H.R.R.273 ECHR

¹⁴⁷ Art.32 and s.34, respectively

¹⁴⁸ Kapur and Misra Select Constitutions Chand & company New Delhi, (2005)India p95

¹⁴⁹ B.O Nwabueze Judicialism in Commonwealth Africa The Role of Courts in Government Hurst & Co. London 1977 p117

¹⁵⁰ Oxford Dictionary (5TH Ed. Oxford University Press 1997, London)

Osatraco (U) Limited v. The Attorney General,¹⁵¹ the Court noted in denounced the declaratory order that *appropriate relief*; ‘ *refers to effective redress and nothing short of this. A less than appropriate redress is not effective redress.* In determining the issue of appropriate remedy the starting point, by way of adopting the position taken by the learned authors,¹⁵² is that *a right without a remedy is a meaningless formality ... the remedies provided under the enforcement provision are the heart and soul of the Constitution.* Therefore, the question of appropriate remedy must not merely be restricted to what a lesser law dictates, but it must be effective remedy directed at redressing the violated right in full. In other words it must be a restoration of the violated right, in the objective sense. It is in this light that we again adopt the position of the learned authors *Misra and Kapur* when they note with regard to the protective provision under the Indian Constitution thus; *The enforcement provisions make no reference to specific remedies, merely authorizing the court to determine an application and to make such orders, issue such writs and give such direction as it may consider appropriate... The right of a person making an application under the provision to ask for both ordinary and extraordinary classes of remedies is not restricted.*¹⁵³

Clearly, the reason why there should be no restriction to the type of remedy available is that, what may be a suitable remedy is dependant on the nature type and degree of violation in issue. So that there can be no remedy that is universally suitable in all circumstances. In our current theme, s.16 imposes a *declaratory order* as being the only remedy against the State. It is submitted that such relief falls short of being an appropriate relief for purposes of redressing any violated rights as envisaged under Art.28, in that it may not be the desired effective redress in an objective sense. In interpreting the meaning of appropriate relief under the protective provision under the South African Constitution, the Constitutional Court of that country in the case of *Fose v. Minister of Safety and Security* asserted that; “*appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus of rights, ... required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary the Court may even have to fashion new remedies to secure the protection and*

¹⁵¹ HCCS 1380/1986

¹⁵² Misra and Kapur Op cit note 47 at p 108

¹⁵³ Ibid p 118

*enforcement of these all 'important rights'.*¹⁵⁴ Thus, it must be a remedy aimed at providing total redress for the violation. Further, this foregoing authority also advances that, in a bid to ensure adequate redress for a violation, the Court may even invent new remedies. Clearly, this approach fits in squarely with the trite rule that human rights provisions under the Constitution must be widely construed in order to give effect to these rights. As earlier noted, the rights established in the Constitution will not be properly protected and enforced as envisaged under the protective provision, if there is absence of effective remedy for an infraction. And the values and rationale underlying the Bill of Rights will be meaningless if a narrow interpretation is given to the human rights provisions under the Constitution. Thus, the remedies available under the enforcement provision include both the ordinary and the extraordinary reliefs. Nwabueze rightly notes; *the court may be under a duty to adjudicate all justifiable violation of the Constitution, but the duty cannot be performed if the law provides no remedy for the particular violation. There can be no inescapable duty to decide if there is no inherent (i.e. constitutionally based) right to appropriate judicial remedies for violations of the constitutions.*¹⁵⁵

3.4 Interpretation of Article 28 of the Constitution

The foregoing brings in the important role of the Court. This is because while the applicant can issue court process to seek particular remedies in terms of Art.28, the issue whether he will get the appropriate remedy rests with the Court. In our current theme, it will depend on how the Court interprets the interface between s.16 of the Act and Art.28. Suffice to mention that it remains valid law that, human rights provisions must be generously and widely interpreted in order to give effect to the individual human rights. Consequently any law that restricts the enjoyment of human rights must be narrowly construed. This in our current theme means that whereas the phrase *appropriate relief* under Art.28 must be given a broad interpretation, the single remedy of declaration under s.16 must be narrowly construed. Thus the realization of the rights under the Bill of Rights presupposes the existence of a court system that gives effect to the realization of these rights. And this seems to be what the Supreme Court of India had in mind when it asserted in the *Minerva Mills v. Union of India*¹⁵⁶ case thus; *'our Constitution is founded on a nice balance of power among the three wings of the state... It is the function of the judges,*

¹⁵⁴ Fose v. Minister of Safety and Security 1997 7 BCLR 851 CC at para 19

¹⁵⁵ Nwabueze Judicialism in Commonwealth Africa at p 109

¹⁵⁶ 1981 (1) S.C.R 206

may their duty, to pronounce on the validity of laws. If the courts are totally deprived of that power, the fundamental rights conferred upon the people will become mere adornments because rights without remedies are just as writs in water” To this extent an enormous task lies with the Court. As the report of the Working Group¹⁵⁷ noted when dealing with the Bill of Rights thus; ‘The existence of the Bill of Rights enunciated in general terms is not enough. The existence of such instrument is not an automatic guarantee of liberty, its effectiveness depends on the integrity of the institutions which apply it...’ Quite clearly, it is one thing to have an enforcement provision and quite another, to have a court system that ensure that the applicant obtains adequate redress or redress at all, for the violation of his right. When commenting on the Bill of Rights Lord Lloyd noted that “the Bill of Rights is constitutional code of Human rights that is binding in law, is generally worded and has certain basic characteristics including that; ...power should be vested in the judiciary to interpret the rights set forth in the Bill of Rights and to determine judicially their proper scope, extent and limits, and their relationship interse and with other laws¹⁵⁸

In granting power to the Court to *make orders, issue writs and give directions* after hearing and determining the application, Art.28 uses the term ‘*may*’. This issue begs for comment because the term *may* as used under this protective provision imports discretion on the part of the Court.¹⁵⁹ The question is whether the word ‘*may*’ is used to mean that the Court has discretion to grant or not to grant relief even where a clear case of violation is proved. Or whether the term is used to mean that the Court may not exercise such power at all but solely be bound by what remedy is available under the other laws, in our present theme, the declaratory order under s.16. It was earlier stated, that human rights provisions must be broadly interpreted and any doubt that arises is weighed or construed in favour of the human rights. It follows therefore that although Art.28 uses the word ‘*may*’ which is discretionary in relation to granting of relief for a violation, the true meaning is that once an applicant has proved the violation there is no reason legally or logically, as to why relief must not be granted to redress the violation. Thus, appropriate relief must always accompany a clear case of violation fundamental human rights in terms Art.28. And

¹⁵⁷ Report of an Interdepartmental Working Goup concerning Legislation on Human Rights European Convention 1976-77 House of Lords at p. 81

¹⁵⁸ Ibid

¹⁵⁹ Nyati v. Member of the Executive Council for the Department of Health Gauteng and Ors (CCT 2008 ZACC) at p 13

the provisions of a lesser law cannot be invoked to justify the restriction for failure to grant the applicant appropriate remedy.¹⁶⁰ Therefore, where one particular remedy is granted in lieu of the suitable remedy, such will amount to a denial of a fundamental right¹⁶¹ to appropriate relief. In our current theme, this translates to mean that by insisting that only a declaratory order is available to an applicant under Art.28 in terms of s.16 of the Act¹⁶² without any room for distinguishing cases such amounts to a denial of a fundamental right to appropriate relief. Similarly, where there is requirement for a prior permit, before exercising a fundamental right it has been held that the fundamental rights of the applicant was denied.¹⁶³ It follows from this that, where in a proper case the interim remedy is denied on basis that only a final order was tenable,¹⁶⁴ this should equally be construed to be a denial of a right to appropriate relief. The rationale being that in both latter cases, the enjoyment of the fundamental right is postponed.¹⁶⁵ In holding that a postponing the enjoyment of a fundamental right is unconstitutional, the Supreme Court in the case of *Mulundika* noted inter alia that, *a prior restraint by way of requiring a prior permit is an injunction prohibiting the freedom of assembly, whether such injunction or prohibition is imposed by statute or by order of Court*¹⁶⁶. Therefore, refusing to grant an interim order to an applicant in a proper constitutional case, on grounds that the injunctive relief was not tenable in view of the *immunity* and the *protective provisions*,¹⁶⁷ should have similarly be construed as an injunction prohibiting the right to appropriate remedy. As will be demonstrated in the next chapter, Court ought to apply the proportionality test in determining whether an applicant under s.28 may be entitled to mere final declaratory order, or other more effective relief including coercive and interim remedy.

¹⁶⁰ *Al-Adsan v.U.K* 2001 34 E.H.R.R 273 ECHR

¹⁶¹ *Nyati v Member of the Executive Council* case

¹⁶² *Attorney General v. Law Association of Zambia*, (S.C.Z No 3 of 2008) Unreported

¹⁶³ *Mulundika's case* Op cit note 37

¹⁶⁴ *Laz case* Op cit note 162

¹⁶⁵ *Mulundika case*

¹⁶⁶ *Ibid*

¹⁶⁷ *Laz case* note 162

Chapter 4

4.0 THE INTERFACE BETWEEN THE IMMUNITY AND THE PROTECTIVE PROVISIONS

The essence of this chapter is to address the interface between s.16 of the State Proceedings Act,¹⁶⁸ and Art.28 of the Constitution.¹⁶⁹ The chapter will, inter alia, look at the role of the Court, rationale underlying the immunity under the Act¹⁷⁰ and the law governing the interpretation of human rights under the Bill of Rights¹⁷¹. This will be followed by adopting three models of analysis;¹⁷² employed by various courts in interpreting the interplay between the immunity under the Act and protective provision under the Constitution. Namely, the *conservative immunity*, the *radical pro-human rights* and the *proportionality* approaches.

4.1 The role of the Courts.

Two positions have so far been established; firstly, that the immunity under the Act is a permissible derogation under the Bill of Rights¹⁷³. And secondly that the fundamental human rights under the Bill of Rights enjoy the status of presumptive inviolability and require that they are widely construed.¹⁷⁴ This brings in the important role of the Courts in interpreting constitutional provisions vis a vis legislative provisions. The question is; *What will be the role of the court in instances where the interface between the immunity provision and the enforcement of protective provision is disputed?* It is the role of the courts to assess whether or not a lesser law is in conformity with the Constitution, and to make an appropriate pronouncement on the operation of each. The role of the court as umpire is to state what the law is. This is the law as seen in the famous United States (U.S) Federal Court case of *Marbury v. Madison*.¹⁷⁵ In this case, C. Justice Marshall asserted thus;

¹⁶⁸ Immunity provision under 'the Act'

¹⁶⁹ Protective provision under the Bill of Rights

¹⁷⁰ This was fully discussed under Chapter 2

¹⁷¹ This was fully discussed in the preceding Chapter.

¹⁷² Which for purposes of this research we shall venture to refer to as;Conservative, Radical and Proportional approaches

¹⁷³ See chapter 2

¹⁷⁴ See chapter 3

¹⁷⁵ 1 Cranch 137 (1803)

'It is emphatically the province and duty of the judiciary department to say what the law is... those who apply the rule to particular cases, must of necessity expound and interpret the law. If two laws conflict with each other, the courts must decide on the operation of each. This is of the very essence of judicial duty'.

Clearly, the power to interpret and state the position of the law rests with the Court, and the interpretation given must reflect society's expectation. As Nwabueze rightly notes; *the courts interpretation of the Constitution should be informed by the fundamental presuppositions of the society, the attitude of the public towards questions of the day and even by consideration of what is good for society.* The public policy and exigencies of society must thus, be weighed as against constitutional provisions in order that the interpretation given reflects the ideals of society at a particular time.

4.2 Purposive Interpretation

Purposive interpretation of human rights provisions, in this instance, refers to the approach by which courts readily apply the teleological method of statutory interpretation and strictly construe restrictions to human rights.¹⁷⁶ The principles governing interpretation of human rights were canvassed under the preceding chapter. Most jurisdictions have strictly adopted this purposive approach. For instance, the Supreme Court of Canada has adopted a dynamic approach with regard to the interpretation of human rights under the Canadian Charter¹⁷⁷, emphasizing its purpose, rather than a literal approach. Thus, in *Hunter v. Southam*,¹⁷⁸ for instance, the Supreme Court of Canada placed a burden of proof upon the government when the latter sought to justify a restriction on the rights under s.1 of the Charter. The same approach was also seen in the later case of *R v. Oake*.¹⁷⁹

Further, when the issue for determination concerns the protected rights any ambiguity is construed in favour of the human rights. This approach is seen in the House of Lords case of *R v. Secretary of State for Home exp. Brind*,¹⁸⁰ where Lord Bridge in upholding the essence of Art.10¹⁸¹ stated thus;

¹⁷⁶ Anyangwe Introduction to Human Rights and International Humanitarian Law . Unza (2004) p222

¹⁷⁷ Canadian Charter of Rights and Freedoms under the (1982) Constitutional Amendment.

¹⁷⁸ 1984 2 SCR 145 at 156

¹⁷⁹ 1986 1 SCR 103 at 261

¹⁸⁰ 1991 1 All ER 720

¹⁸¹ European Convention of Human Rights

It is already well settled that in construing any provision of domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to, or conflicts with the Convention, the courts will presume that Parliament intended to legislate in conformity with the Convention, not in conflict with it. The foregoing clearly demonstrates that various jurisdictions continue to construe human rights provisions in a way that gives effect to the individual human rights by deliberately adopting a purposive approach.

4.3 The Interface between the Immunity provision and the Protective provision.

An assessment of the cases that have dealt with the interface between the immunity provision(s.16 of the Act) and the protective provision (Art.28) under the Constitution, reveal that, courts have been facing immense challenges in this area of the law. Courts from various jurisdictions have approached the matter very differently and with desperate consequences.¹⁸² These various approaches will now be investigated.

4.3.1 Conservative or Absolute Immunity Approach.

In Zambia, case law reveals that the Court's approach to interpreting the immunity under the Act vis-à-vis the protective provision under the Constitution is that, the immunity of the State under the Act is absolute in all instances. This approach is Conservative, in that, it tends to stick to the old rule of 'King can do no wrong'¹⁸³ approach. Under this approach courts have readily upheld the immunity as provided for under the Act without hesitation. As earlier seen under chapter 2, the court upheld the immunity under the Act¹⁸⁴ in its absolute terms, in the case of *Walulya v. Attorney General* and refused to grant the injunction sought by the applicant. Notwithstanding that the applicants rights as established under the Bill of Rights were being violated¹⁸⁵ in terms of Art.28. However, the Court in this case did in principle accept that an interim relief was possible under certain instances.¹⁸⁶ In the most recent *LAZ case*¹⁸⁷ a similar approach was seen when court upheld

¹⁸² LAZ Case(Zambia), The Nyathi case South Africa and The Rwanyarare case Uganda all came up with dissimilar and regarding construing the interface between immunity and protective provision under the relevant Constitutions.

¹⁸³ As discussed by H.W.R Wade in his Administrative Law ELBS Oxford University Press (5th ed. 1986 at p698)

¹⁸⁴ S.16(1) (i), (ii) and (2)

¹⁸⁵ Particularly Art.18 of the Constitution was being violated by the deportation order issued as against the applicant.

¹⁸⁶ See full discussion at p5 of Chapter 2

¹⁸⁷ Law Association of Zambia v. Attorney General, SCZ J No- 3 /2008,(unreported).

the immunity provision merely on the basis that interim relief was not tenable in view s.16 of the Act, nor under Art.28 of the Constitution. Erroneously, the court's interpretation of the interface between s.16 and Art.28 has been that, s.16 of the Act only empowers the court to grant a declaratory order. And that, under Art.28, the whole application must first be heard, before an order is granted. And further that, the net result of the interface between the two provisions in terms of the remedy available to applicant was that, the court can only issue a final declaratory order of the parties' rights. And therefore that, no interim relief could be granted.

In the *LAZ case*, the Supreme Court did not advance any convincing rationale for rejecting the interim injunction. The court also refused to pronounce upon the interface between the two provisions. Sadly, the court merely upheld the immunity under the Act. Holding that, the wording of Art.28 makes no provision for interim orders and that the application must first be heard and determined by court. And further that to make a pronouncement on the interface of the two provisions in the circumstances of that case, would amount to an unnecessary academic exercise.¹⁸⁸ It is submitted that this mode of construing the two provisions is faulty and amounts to a misdirection in law. Further, the refusal to make the pronouncement on the interface is regrettable because this area of law remains uncertain. So that whereas it is pleasing to note that some High Court judges are able to issue the injunctive relief,¹⁸⁹ it is sad that these decisions of the High Court do not bind the Supreme Court.¹⁹⁰ In the circumstances, there is nothing to stop the Supreme Court from holding otherwise as seen in the most recent *LAZ case*. Thus, this area of law remains uncertain because the Supreme Court has not adequately dealt with it. Consequently, as the law presently stands in Zambia today, the law would not come to the aid of an applicant who seeks an injunction on the basis that an impending act of the State will violate or that the act continues to violate, any of his rights under the Constitution.

-Why do Courts in Zambia adopt this absolute approach? Is it the approach preferred by all judges?

This research reviewed that the reasons why the Court in Zambia lean towards the *absolute* immunity approach are twofold. Firstly, while the Act is meant to achieve a noble purpose, the

¹⁸⁸ Law Association of Zambia v. Attorney General, SCZ J No- 3 /2008,(unreported). at p 31

¹⁸⁹ Musengule v. Attorney General 2004/HP/0589 (unreported)

¹⁹⁰ Kasote v. The People (1977) ZR 75 S.C

actual implementation of the s.16 is diluted by officers at the Ministry of Justice.¹⁹¹ The latter statement finds support in this research in view of what Mr.Mumba Malila¹⁹² advised, thus; *'I know what you are driving at. We are the government and to give you an objective position on your topic would be going against certain fundamental government policy considerations...'* Clearly, the foregoing statement shows that while the government officers are fully aware of the injustice resulting from the absolute immunity approach, they are not, however, keen to see this trend abated. These officers have adopted a defensive or dogmatic approach to the import of s.16 vis-à-vis Art.28, and insist that the immunity is absolute. It is reiterated that this approach is flawed because it subordinates Art.28 to s.16. In practice the effect is that it perpetuates injustice. Arguably this sort of interpretation could not have been what the framers of our Constitution intended. Thus, the attitude of government officers in this area of the law leaves much to be desired. This can also be inferred from the statement advanced by a senior officer¹⁹³ at the Ministry of Finance and Economic Development. This officer firmly stated that; *the government deserves to enjoy the immunity under the Act* and further that *payment of these awards 'is not a matter of life and death for the government.'*¹⁹⁴ Thus, the courts have adopted the absolute immunity because of the deliberate attempt to defeat justice on the part of these public officers. And also because, there seem to be absence of judicial activism on the part of the bench. This foregoing fits well with Mr.Malambo's understanding of s.16. The State Counsel observed that *s.16 is a perfectly legal ouster provision, but the courts have power to interpret it, on case by case basis, in such a way as to achieve the end of justice while keeping the spirit of the provision.*¹⁹⁵ The position adopted by Mr. Malambo is supportable in this research, as will shortly come out when discussing the *proportional* approach.

¹⁹¹ This is reviewed by Mr Malambo State Counsel in an interview at his chambers held on the 13th January,2009. And further that during the Chiluba era there was an attempt to further tighten s.16 initiated by officers at the Ministry of Justice. This was to be achieved by way of including the relief of 'stay'(currently available under administrative action (Order 53 of Rules of the Supreme Court of The United Kingdom) to fall under the prohibited reliefs under the s.16. That the intention was to completely insulate the State against any form of coercive order.

¹⁹² In his capacity as Attorney General advised this researcher when approached for an input on the theme.

¹⁹³ Mr Benard Phiri a Chief Economist (under Economic Management), who also sits at the Compensation and Award Committee chaired by the Permanent Secretary of the Ministry of Finance. In an interview at their Ministry HQ held on the 9th January 2009, Mr Phiri also reviewed that in 2007 government owed various claimants a total of K200 Billion in awards and compensation, against the relatively modest K71 Billion set aside in that year's budget for the purpose.

¹⁹⁴ Interview with Mr Bernard Phiri Ibid

¹⁹⁵ Ibid

The second reason as reviewed in this research is that certain judges are obsessed with State immunity.¹⁹⁶ There are other judges, however, who appear to understand the spirit of s.16 when interpreted in light of Art.28, in a proper constitutional case. These judges have issued injunctions under the guise of ‘stay of execution’¹⁹⁷. This is seen by the bold stance taken by the judge¹⁹⁸ in case of *Musengule v. Attorney General*¹⁹⁹ argued by Mr. Malambo. In granting the injunction (ex parte) order the judge noted thus ‘*this being a fit and proper case to do so, it is hereby ordered that all further proceedings and implementation of the Government decision to repossess House No..., be stayed until after hearing of the petition...*’ Thus, while a few judges may seem to adopt the proportional approach when interpreting the interface in this theme, the Supreme Court of Zambia, has itself continued to maintain that the immunity of the State under s.16 is absolute.²⁰⁰

4.3.2 Towards stripping the immunity of the State; *The radical and the proportional approaches.*

Some jurisdictions see the immunity under the Act as constituting a violation to the protected rights under the Constitution, and consequently many jurisdictions have completely done away with it.²⁰¹ While many others, are still striving to find ways of minimizing its adverse effects on the protected fundamental rights and freedoms. For instance, although the immunity provision under the Zambian Act and United Kingdom (UK) Crown Proceedings Act are on all fours,²⁰² the current law in the U.K.²⁰³ is that an injunction can issue against the Crown servant, notwithstanding that the act may have been done in the course of Crown duty. But in Zambia no action can be sustained against him in person, for anything done in performance of State duty.²⁰⁴ In order to outwit the adverse effect of the immunity under the Act on the fundamental human rights, two approaches have since been adopted. Namely; the *radical pro-human rights approach*, and the *proportional approach*.

¹⁹⁶ Take for instance C.J Sakala. With due respect, he was behind the decision in the High Court case of Walulya. So his inclination towards the absolute immunity in the Laz case would not come as a surprise.

¹⁹⁷ As seen in the earlier case of *Kabimba v. Attorney General and Another* (SCJ No-13 1996 unreported)

¹⁹⁸ Justice Mwanamwambwa.

¹⁹⁹ 2004/HP/0589 (unreported)

²⁰⁰ As seen in the *Zambia National Holding & Another v. Att/Gen* 1993-94 ZR 115 S.C (UNIP case) and also in LAZ case.

²⁰¹ De Smith *Judicial Review of Administrative Action* (1968) Ltd 2nd Ed. London p463

²⁰² S. 21 and s.16 of the United Kingdom Crown Proceedings Act and Zambian State Proceedings Act, respectively

²⁰³ Seen in the case of *M v. Home Office* (1992) QB 270

²⁰⁴ *Stickrose Pty Limited and The Permanent Secretary Ministry of Finance* (S.C.Z J. No- 30 1999) unreported.

4.3.3 The radical pro-human rights Approach.

The radical approach to the interface between fundamental human rights and any restrictive law is premised on supremacy principle.²⁰⁵ The approach perceives the norms under the Bill of Rights as enjoying the character presumptive inviolability. This approach advances that, any violation to the rights under the Bill of Rights is, in terms of the Constitutional supremacy provision, ineffective and therefore void to the extent of its inconsistency with the Constitution.²⁰⁶ In essence, this approach frowns upon any derogation to these rights. The approach applies the supremacy provision²⁰⁷ to strike down any law that is deemed inconsistent with the rights under the Bill of Rights. This was the approach adopted by the High Court judge in the UNIP case,²⁰⁸ when he declared the immunity provision under the Act as being invalid, for contravening the Constitution.

A similar radical approach was seen in the South African case of *Nyathi v. Member of the Executive Council for the Department of Health, Gauteng and Others*²⁰⁹ (*Nyathi case*). In this case, the Constitutional Court had to strike down the immunity provision under the South African Act²¹⁰ that prohibited execution and attachment of State assets on the basis that, that impugned provision unjustifiably placed the government above the law, contrary to the Constitution. The problem with this approach is that it ignores the essence of permissible derogations as provided for under the Bill of Rights itself. To this extent, it is submitted that this approach is also skewed and lopsided for ignoring the interests of the State. And thus, not supported in this presentation. This is so because the permissible derogations, it is submitted, play a very essential role in harmonizing the constitutional provisions. These derogations are therefore indispensable under a Constitution of a democratic State.

4.3.4 The Proportional approach.

This proportional approach to the interpretation of the interface between the immunity and protective provisions applies the proportional test in assessing the legality of the infringing law. The starting point is that all the relevant provisions of the Constitution bearing on an issue have to be called-in.

²⁰⁵ Art. 1(3) of the Constitution

²⁰⁶ *Mumba v. The People* (1984) Z.R 38 H.C

²⁰⁷ Art. 1(3)

²⁰⁸ *National Holdings and other v. Attorney General case*

²⁰⁹ 2008 ZAAC 8

²¹⁰ S.3 of the State Liability Act of South Africa (1957) immunised the State

This is founded on the trite fundamental rule of constitutional construction that *'all the constitutional provisions bearing upon a subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument.'*²¹¹ Under this principle of proportionality, the approach is that the limitation imposed by such lesser law (immunity provision in this instance) must not be more than is reasonably necessary to achieve the legitimate object. That such law must not be drafted too widely as to net everyone including the untargeted members.²¹² Thus, the requirement here is that, whereas a law limiting the enjoyment of fundamental rights under the Bill of Rights may be permissible, it must be interpreted in such a way that it is not excessive in terms of the violation it imposes on fundamental rights. And that it must not net untargeted members. So that an interim relief should, as of right,²¹³ issue against the State in a proper constitutional case to restrain the latter from violating the applicant's rights.²¹⁴

After calling all relevant provisions of the Constitution, the next requirement under this approach is to ascertain and ensure that the infringing law falls within the permissible derogations under the Bill of Rights. Thirdly, it must be ascertained that the limitation is one that serves a legitimate government function,²¹⁵ or must be one acceptable and justifiable in public interest.²¹⁶ Upon ascertaining the foregoing, the proportional test applied is intended to assess the degree of harm done by such lesser legislation to the applicant's right(s) on the one hand, against the common good sought to be achieved in the interest of the public.²¹⁷

Thus, in terms of the current theme, this relates to assessing whether the need to ensure that State machinery is not put to a halt in a particular case before court, outweighs the harm done by this immunity provision to the applicant's rights.²¹⁸ Where the answer is in the affirmative, the Court is justified in refusing to grant the interim relief. And by parity, where the need to uphold the individual rights outstrip the public good, court must grant the interim relief. In practical terms, the test is whether or not the applicant has a prima facie good case under the Constitution. Where an applicant has a good case, the supremacy of the fundamental rights under the Bill of Rights will

²¹¹ South Dakota v. North Carolina 192 US 268 (1940)

²¹² Mulundika and Others v. The People (1995-97) SCZ J.No 25

²¹³ In terms of Art.28

²¹⁴ Musengule v. Attorney General 2004/HP/0589 (unreported)

²¹⁵ Nyathiv v. Member of The Executive Council and Ors CCT 2008 ZACC (The dissenting view in this case)

²¹⁶ Op cit Mulundika note 212

²¹⁷ De Waal and Currie; The Bill of Rights Handbook (5th Ed. Juta Cape Town 2005) p 37

²¹⁸ Under the Bill of Rights

warrant that the court should in terms Art.28 grant the interim relief sought by the applicant. And by parity, such interim relief should not be granted where the basis upon which it is sought lacks merit or is, in courts view, frivolous.

The question that arises now, is; *How is the Court going to tell with sufficient certainty, whether the applicant in a particular cause has a good constitutional case, at this interim stage?* This interim determination will be made possible by requiring that the application for interim relief is made inter parte. This allows for both parties to make submissions for, and against the granting of the interim relief. So that, the court is availed with sufficient facts, to which the court will apply the test and make an interim finding. Therefore, the court is not called upon to conjecture in arriving at whether or not to grant an interim relief. To this extent this presentation criticizes the idea of granting an injunction ex parte, evidenced in the *Musengule case*,²¹⁹ as being improper.

This proportional approach will in our present theme be in terms of weighing to what extent, if at all, the applicant's rights were indeed being violated on the one side of the scale, as against the extent to which State machinery would be impeded. This was the approach taken by the High Court in the Ugandan case of *Osatraco (U) v. Attorney General*.²²⁰ In this case, the court correctly applied the proportionality test as outlined above. Upon finding in favour, of the applicant, the court denounced the single remedy of declaration under the immunity provision, as not amounting to appropriate relief envisaged under the protective provision. The court further stated that, the immunity provision was not in conformity with the Constitution in that particular case, to the extent that it compelled the court to avail only such (declaratory) relief, without any qualification. Thus, the proportional test was applied to weigh the immunity provision as against the protective provisions as read with other relevant provisions of the Constitution. Upon the foregoing, the court made a finding that was deemed appropriate under those particular set of facts. In other words, the question whether the injunctive relief should issue will not depend on the general rule of supremacy of constitutional provision.²²¹ Nor will it depend on the old rule of 'king can do no wrong'. Rather this will depend on the outcome of the proportionality test. This is exactly what the court in this *Osatraco (U)* was referring to when it laid emphasis on the phrase '*in the circumstances of this case...*'²²² And in

²¹⁹ Op cit Musengule case note 214

²²⁰ HCC 1380/1986 (unreported)

²²¹ As seen under Art.1(3)

²²² Op cit Osatraco case note 220

another case of the Ugandan Constitutional Court²²³ the court noted upon hearing both parties thus; *The provision of the Government Proceedings Act²²⁴ is an existing law which under Art 273(1)²²⁵ of the Constitution must be construed with such modification and adaptations as may be necessary to bring it into conformity with the Constitution.*” On the basis of the foregoing it is clear that an interim relief must issue against the State notwithstanding that this type of relief is prohibited under the Act. The proportionality test is supported by a stream of authorities. In affirming this principle, Lord Denning declared that *‘the courts are not deterred by the fact that an injunction against public authority is a particularly drastic step, bringing machinery of government to a halt. They do not lend a ready ear to pleas of administrative convenience. Even if chaos should result, still the law must be obeyed’²²⁶* Barely ten years later Lord Denning coined the phrase *‘restrictive immunity’²²⁷* to refer to this construction by which the immunity of the State may be appropriately suspended from operation depending on facts in a particular case. It was in line of approach also, that Lord Reid earlier asserted thus; *the ground put forward has been said to be Crown privilege. The real question is whether the public interest requires that the letter shall not be produced, and whether that public interest is so strong as to override the rights and interest of a litigant that he will lay before court’²²⁸*

What comes of the Ugandan cases is that where an applicant had a good case under the protective provision of the Constitution the immunity under the Act must not be annulled, but must be appropriately or narrowly construed in order that it conforms to the Constitution. The foregoing position is further buttressed by what C.J Marshall meant when he noted that; *‘those who apply the rule to particular cases, must necessarily expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the Constitution, if both the law and the Constitution apply... the court must determine which of these conflicting rules govern the case.’²²⁹* Thus, the proportionality approach remains unchallenged when it comes to interpreting infringing legislation in light of constitutional provisions. In light of this it is safe to conclude that, the conservative immunity approach violates the fundamental rights in a

²²³ *Rwanyarare and Others v. The Attorney General* (Constitutional Application No.6 of 2002 unreported)

²²⁴ A Ugandan Act that is on all fours with the Zambian State Proceedings Act (Cap71)

²²⁵ The Protective provision under the Ugandan Constitution.

²²⁶ *Bradbury v. Enfield* (L.B.C 1967 1 WLR 1311)

²²⁷ *Trendtex Trading Corp. v. Central Bank of Nigeria* (1977) QB 529 CA

²²⁸ *R v. Lewis Justices Exp. Home Secretary* (1973) A.C 388

²²⁹ *Marbury v. Madison* 1 Cranch 137 (1803)

proper constitutional case.²³⁰ Similarly, the radical pro-human rights approach is also undesirable for overemphasizing human rights and ignoring the essence of permissible derogation under the Bill of Rights.²³¹ In essence the proportionality approach strikes a balance between the other latter approaches. In upholding the proportional test approach Nkabinde.J's pronouncement in the dissenting judgment in the case of *Nyathi*,²³² is instructive. In expressing his opposition to striking down of the impugned provision²³³ he asserts thus; '*Legislation must be construed consistently with the Constitution and thus, where possible, interpreted so as to exclude a construction that would be inconsistent with judicial independence. If held to be unconstitutional the appropriate remedy ought, if possible to be in the form of actual severance or reading in, so as to bring the law within acceptable constitutional standards. Only if this is not possible, must a declaration of complete invalidity of the section be made.*' This far, it is clear that the proportionality approach remain the most highly feasible mode for purposes of construing lesser law vis-a-vis constitutional provisions. It is further noted that, the thread running through the authorities that adopt the proportionality test is that, court should not be obsessed with either the immunity of the State nor the fundamental rights under the Bill of Rights. This must only be decided after applying the proportionality test.

It was noted earlier that in Zambia some judges have been able to award the interim injunction in deserving cases.²³⁴ The question that arises is; *What is the difference between the interim injunction that was granted in Zambia²³⁵ and one granted in Uganda²³⁶?* In the High Court case of *Musengule* the judge granted the interim injunction to the applicant notwithstanding that the Supreme Court had earlier ruled to the contrary in the UNIP case.²³⁷ Consequently since decisions of the High Court do not bind Courts of similar standing or the Supreme Court, there is no certainty established regarding award of this relief as evidence in the later case of *Laz*.²³⁸ In this latter case the Supreme Court ruled that the immunity of the State under the Act is absolute, and that an interim relief is not available in terms of s.16 or under Art.28. On the other hand, there is certainty established regarding the award

²³⁰ Law Association of Zambia v. Attorney General, (SCZ J No- 3 /2008, unreported)

²³¹ Nyathi v. Member of The Executive Council and Ors CCT 2008 ZACC

²³² Ibid

²³³ Op cit s.3 of State Liability Act note 42

²³⁴ See *Musengule v. The Attorney General* 2004/ HP 0589 unreported

²³⁵ Ibid

²³⁶ *Rwanyarare and Others v. The Attorney General* (Constitutional Application No 6 of 2002 unreported)

²³⁷ *Zambia National Holdings and Another v. Attorney General* (1993-94) ZR 115 SC

²³⁸ Op cit note 62 in this later case where the Court refused to grant the interim injunction

of an interim injunction granted in Uganda because the highest court²³⁹ has ruled to this effect. Admittedly, the law surrounding the immunity provision in Zambia is problematic,²⁴⁰ as the research reviewed. In an interview at the Law Development Commission offices Mrs. Maimbo suggested that, it may help our courts if the phrase court *shall not* as used in prohibiting coercive reliefs under s.16 was replaced by court *may not*. Her reasoning was that, the phrase *may not*, would immediately send a message that there is discretion under s.16. She however noted²⁴¹ that interim reliefs should be available under s.16 as read with Art.28, in a proper constitutional case.

Having laboured this far, and establishing that the principle of proportionality is the ideal test in *construing legislation in light of constitutional provisions*, we now turn back to our theme.

That is; *Is the s.16 of the Act consistent with Art.28 as read with Arts 1(3) and 1(4)?* The answer is in the affirmative. The proportionality test as discussed above, clearly demonstrates how the two provisions can be harmonized. This is also deducible from the fact that, despite the use of mandatory phrase court *shall not* in prohibiting the reliefs under s.16, some judges have still granted the reliefs prohibited under the Act.²⁴² It was noted earlier that the thread running through Zambian case law, is the erroneous perception that, an interim relief was not among the reliefs envisaged under s.16(i)(ii) and 2 of the Act and Art.28 on the basis that the court must first *hear and determine* the whole application (Art.28) before a final declaratory order issued. This position has since been adequately dispelled above as being a sheer Conservatist approach.²⁴³ Further, since the law as seen in *South Dakota v. North Carolina*,²⁴⁴ is that all constitutional provisions bearing upon a particular subject must be brought into view, the Zambian Courts have been in breach of this law. The law in this *South Dakota case* was recently followed in the most recent Ugandan case of *Kafeero and Another v. Attorney General and Another*.²⁴⁵

Our Courts have failed to adequately interpret the interface between the s.16 of the Act and Art.28 of the Constitution because they have taken and construed the latter provision in isolation from Art.

²³⁹ Constitutional Court of Uganda

²⁴⁰ This was reviewed by Chibesa Maimbo (a lawyer and also) a research officer in course of the interview at the Law Development of Zambia offices, held on the 12th January 2009 at 10 00hrs- 1100hrs.

²⁴¹ Though on the mere basis that constitutional provisions are supreme

²⁴² High Court case of the UNIP case Op cit note 69 and the Musengule case Op cit note 66

²⁴³ See discussion under Conservative or Absolute immunity approach

²⁴⁴ 192 US 268 (1940)

²⁴⁵ Constitutional petition No 22 of 2006 (2008 UGCC 3)

1(3) and 1(4).²⁴⁶ It is further submitted that, even if we were to hold for a moment²⁴⁷ that construing Art.28 in isolation was correct, which we do not, this manner of construing the immunity and protective provisions conflicts with the principles governing interpretation of human rights provision. This was exhaustively discussed under Chapter 3. In terms of these principles governing interpretation of human rights provisions, the phrase *hear and determine* under Art.28 will require that the phrase is interpreted broadly and generously in order to give to individuals, a full measure of the rights under the Bill of Rights.²⁴⁸ This means that the phrase *hear and determine* must be interpreted as including an interim inter parte hearing and interim finding. And not as being restricted to a final declaration.²⁴⁹ Thus in a deserving case the interim relief must be granted upon an interim hearing inter parte after applying the proportional test. In this sense, hear and determine would be seen to be satisfied if after an interim hearing a deserving applicant is granted any appropriate interim relief, including relief that is prohibited under the Act.

On the other hand the phrase ‘court *shall not*’ that is employed under the Act²⁵⁰ which courts construe as implying an absolute bar prohibiting issuance of coercive and injunctive reliefs against the State, must be narrowly construed in deserving cases. Meaning that, the prohibited reliefs should issue in proper constitutional cases. In the same vein the interpretation of the provision restricting relief to a mere declaratory order must be narrowly construed where it is in a proper constitutional case. So that the court must be able to grant any appropriate relief as envisaged under Art.28, including the reliefs prohibited under the Act. This is clearly so because, by the principle of restrictive immunity, the provisions of the legislation having a chilling or restrictive effect on the human rights are temporarily frozen or suspended, in a proper constitutional case, in order to allow for full enjoyment of the protected rights. The preceding discussion clearly goes to dispel as unsound, the erroneous interpretation adopted by the Zambia Courts in justifying their passion for absolute immunity.

²⁴⁶ When construing Art.28 of the Constitution Art.1(3) and 1(4) ought to be taken on board because they are also seen as bearing on the same subject.

²⁴⁷ As the Supreme Court did in the UNIP and Laz cases, supra

²⁴⁸ Anyangwe Introduction to Human Rights and International Humanitarian Law . Unza (2004) p222

²⁴⁹ Walulya v. Attorney General (1980) Z.R 327 H.C, and also LAZ case

²⁵⁰ S.16 of the State Proceedings Act

At this point a brief review of the *Zambian* cases that have dealt with the subject matter in this discussion is essential. In the case of *Walulya*²⁵¹ the order to deport the applicant was issued at a time when the applicant had appealed against the conviction and sentence in the criminal case in which he had been convicted. This was the conviction which was the basis for the deportation order. In this application, the applicant challenged the order to deport him and sought an injunction on grounds inter alia that, deporting him will be tantamount to extinguishing his legal rights. Further, the applicant had filed a claim before the High court claiming for loss of his property after a wrongful seizure by the State. Clearly, this was a proper constitutional case and the injunctive relief should have been granted to restrain the State from deporting him, pending the outcome in the main cause.

Applying the proportionality test, the injunction would not have jeopardized the functioning of the State machinery in any way. Denying him the injunctive relief as evidence in this case, clearly amounted to a violation of his right under Art.28. It also amounts to subordinating the latter to s.16.

In the *UNIP*²⁵² case, the property in issue had at all material times been the applicant's property. By this application the applicant sought an injunctive order to restrain the defendant from taking wrongful possession or occupation of the property, until the matter in the main cause, was disposed off. This case when subjected to the proportionality test would undoubtedly reveal that the injunction was not going to be detrimental to public interest or state machinery. On the other hand the applicant's property rights were clearly violated by the Court's refusal to grant the relief.

In the most recent case of *LAZ*²⁵³ the applicant sought an injunctive relief to restrain the President from announcing the election date, contending that the mandate to do so fall within the mandate of the Electoral Commission of Zambia. Thus, the application was only directed at restraining the President, so that the Electoral Commission could have gone ahead to announce the election date. In this way, the State machinery would not be unnecessarily hampered. Sadly, the court refused to grant the injunction and upheld the immunity under the Act without any hesitation. It is difficult though to show how the Court could have determined the degree of violation to be occasioned on the

²⁵¹ *Walulya v. Attorney General* 1980 ZR 327 HC

²⁵² *Zambia National Holdings and Another v. Attorney General* (1993-94) ZR 115 SC

²⁵³ *Law Association of Zambia v. Attorney General*, SCZ J No- 3 /2008,(unreported). at p 31

applicant's right,²⁵⁴ after applying the proportionality test. However, given that any doubt or ambiguity arising from the proportionality test must be construed in favour of human rights,²⁵⁵ the interim injunction should have been granted.

In light of the foregoing discussion and in light of the principle of proportionality, it is clear that the decisions in the *Walulya*, *UNIP* and *LAZ* cases were flawed. To this end, it is safe to conclude in light of the foregoing that, s.16 is perfectly consistent with Art.28 as read with Arts.1(3) and 1(4) of the Constitution. It is additionally submitted, that the immunity of the State under the Act is not absolute. That s.16 is, in a proper constitutional case, qualified Art.28 and that, in a proper constitutional case, the High Court has the power to issue any appropriate relief²⁵⁶ against the State including coercive and/or interim reliefs. The only thing missing is a Supreme Court pronouncement on the law surrounding the interface in this theme, as outlined above, so that there is binding precedent and thus, certainty. It is submitted that this approach will also be consistent with the need to effectuate the great purpose of the Constitution. In this way we will not only be realizing the essence of the Constitution but also ensuring that the immunity under the Act is restricted to serving its intended purpose.

²⁵⁴ Applicant alleged that his right as established under Art.23 will be infringed

²⁵⁵ Per Lord Bridge in *R v. Secretary of State for Home Affairs* [1991] 1 All ER at 720

²⁵⁶ In terms of Art.28

5.0 CONCLUSIONS AND RECOMMENDATION

This chapter is primarily concerned with outlining the various conclusions drawn from the study on the current theme. Particularly, the interpretation of the interface between the immunity and the protective provisions. This will be followed by a recommendations, or possible ways of solving the problem or at least mitigating the mischief identified.

5.1 CONCLUSIONS.

Under chapter 4, three approaches were discussed as models that have been adopted by various jurisdictions in interpreting the interface between the two provisions. Namely, *absolute or conservative immunity*, the *radical pro- human rights* and the *proportional test approaches*.

5.2 The absolute immunity approach

It is clear from the *Zambian cases* reviewed in this study, that in *Zambia*, the courts have adopted the absolute immunity approach. Upon which the courts have held that the immunity of the State from reliefs prohibited under s.16 of the Act is absolute. This study revealed that this approach has the effect of subordinating Art.28 to s.16. And also that it undermines the Constitution as supreme the law. In practical terms, the absolute immunity approach results in the violation of the fundamental human rights and freedoms, in a proper constitutional case. The study also reveals that the pro-human rights approach is defective in the sense that, it ignores the essence of permissible derogations existing within the Bill of Rights. This study reveals that the ideal model for interpreting the interface between s.16 and Art.28 is the proportional test approach. The findings revealed that this approach harmonizes s.16 and Art.28. With the result that s.16 of the Act, stands perfectly consistent with Art.28, as read with Arts.1 (3) and 1(4). This approach also established that the immunity of the State under the Act is not absolute. That it is qualified by Art.28, so that where the applicant has a proper constitutional case in terms of Art.28, an interim or coercive relief will lie against the state. It was also seen and concluded that, the holding that only a final declaratory order of the parties rights is envisaged in terms of s.16 and Art 28, only stands where the applicant's right is outweighed by public interest.

It was further revealed and is concluded that, since the court needs to be availed with sufficient facts before making the interim order for or against the issuance of the injunctive relief, all applications must be made *inter parte*.

5.3 Manner of construing of Article 28 and s.16

The study reveals that the source of misdirection in construing s.16 in a petition made under Art.28, has arisen because the courts erroneously construed each of these provisions separately from the other. Instead of construing the interplay between the two provisions, the courts proceed by construing s.16 independently, and then go to interpret Art.28, separately. This was found to be improper and has *inter-alia* been the source of misdirection on the part of the Court. It is concluded therefore that the ideal manner of dealing with the two provisions is by construing the interface or interplay between the two provisions. This allows for determination of the relationship *inter se*, upon which the court, on a case by case basis, is able to make an interim decision, depending on the facts of the case..

5.4 Manner of construing Art.28

The study also reveals that in deciding petitions under Art.28, the courts leave out Art.1 (3) and Art.1 (4), when construing Art.28. Consequently, the State is treated as if it is not subject Art.1 (3) and 1(4). The courts interpret constitutional provisions as if they are interpreting provisions of ordinary legislation. And therefore that the human provisions under the Bill of Rights are construed in a restricted manner, contrary to the fundamental principles governing interpretation of human rights provision as seen under chapter 3. And further that, in terms of the rules governing the interpretation of human rights provisions, the phrase *hear and determine* as used under Art.28 includes hearing and determining at an interim stage. The final conclusion drawn on this basis is that the courts must construe constitutional and human rights provisions in accordance with rules governing the interpretation of these provisions as seen under chapter 3.

5.5 Manner of construing the immunity (s.16) under the Act.

The study revealed that the immunity of the State is a legally permissible derogation envisaged under the Bill of Rights, as required in public interest. But that the courts have considered s.16 of the Act as a mandatory provision and which it applied in a wholesale fashion. And that the reason why courts have adopted this manner of construing s.16 because of the use of the word ‘*shall not*’ as used under s.16. Upon this the courts apply the immunity in absolute terms without distinguishing cases. The study further revealed that when interpreting a restrictive provision (such as s.16) in light of human rights provisions any law that restricts enjoyment of fundamental human rights must be narrowly construed. The study also revealed that officers at the Ministry of Justice have insisted on the wholesale application of s.16. It was further revealed that s.16 is an ouster section and depends on courts interpretation. And that the courts should have power to interpret it in such a way as to achieve the end of justice, while keeping the spirit of the provision. The conclusion therefore is that the courts have power, in proper constitutional cases to construe s.16 narrowly, when interpreted in light of Art.28.

5.6 RECOMMENDATIONS.

Upon the findings from the study as outlined above, the following recommendations are now advanced as possible ways of solving the legal vacuum seen in the conclusions above.

5.6.1 *The ideal approach to be adopted when interpreting s.16 vis-a-vis Art.28.*

Major recommendation

(i) To the courts-

In light of the findings in this study the proportional test approach is the ideal approach to be adopted by the courts. As a major recommendation, it is therefore recommended that that our courts must adopt the proportional approach when interpreting the interface between the immunity and the protective provisions. The reason for adopting the proportional approach is that it harmonizes the two provisions as seen in the conclusions above, and under chapter 4. This approach also eliminates the excessiveness associated with the absolute immunity approach.

(ii) To legal practitioners-

In this vein legal practitioners are urged to be unwavering on their submissions to this effect whenever an opportunity is available. The court may be persuaded by the submissions made on behalf of the applicant as long as these are well argued.

(iii) To officers at the Ministry of Justice-

It is recommended that these officers adopt a more liberal attitude towards the interface. In this sense, it means that the officers must accept that the proportional approach is the most ideal approach.

(iv) To the government authorities-

It is strongly recommended that the money set aside for compensation must be increased to match the ever increasing liability of the State. This as was seen earlier, would help relax the defensive pro-immunity attitude seen in the officers at the Justice Ministry.

5.5.3 Manner of construing of Article 28 and s.16

To the courts-

Contrary to construing each of these provisions in isolation of the other, as the courts in Zambia have done, it is recommended that the court must look at interpreting the interface between the two provisions. The court must look at the synchronization or harmonious interface between the two provisions, and not construing each provision in isolation as seen in the past.

5.5.4 Manner of construing Art.28

To the courts-

Since Art.28 is a human rights provision, it is recommended that the courts must construe it expansively in order to give effect to the rationale for which it exists vis-a-vis the human rights under the Bill of Rights, as seen under chapter 3. To this end an interim relief must be seen as falling within relief envisaged in terms of this provision. It is also recommended that when construing Art.28 court must always bring into view, Arts1(3) and 1(4).

5.5.5 Manner of construing the immunity (s.16) under the Act

To the courts-

S.16 is an ouster provision, it is therefore recommended that the courts must be able to freeze or suspend it in proper constitutional cases. The rationale for this is, as was earlier discussed under chapter 3 is that any provision that restricts full enjoyment of the rights must be narrowly construed. As such, the State must be subjected to restrictive immunity in a proper constitutional case. In the same vein the court must not be bound by the restriction that only a mere declaratory order of the parties' rights is available under s.16.

5.5.6 Amendment to s.16

To Parliament-

In addition to the foregoing recommendation under s.16, it is recommended that Parliament must consider an amendment to s.16 by replacing the phrase '*court shall not*', with the phrase '*court may not*'. Since this latter phrase imports discretion it will assist those judges who construe the word '*shall*' under s.16 as implying an all-round absolute bar, to issuance of prohibited reliefs.

Notwithstanding the other recommendation however, it is reiterated that the single most important recommendation is that, the Supreme Court of Zambia must adopt the proportional test approach and make the relevant pronouncement regarding the interface between s.16 and Art.28. The importance of such pronouncement requires not further emphasis at this stage.

5.7 EPILOGUE

‘ I venture to believe that it is important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Shakespear, Machiavelli, Plato, Hume, and Kant as with the books which have been specifically written on the subject.

For in such matters everything turns upon the spirit in which he approaches the question before him. The words he must construe are empty vessels into which he can pour nearly anything he will.

For men do not gather figs of thistles, nor flexible bodies of knowledge from judges whose outlook is limited by parish or class’.

Judge, Leaned Hand U.S 20th century American judge.

BIBLIOGRAPHY

STATUTES

1. Constitution of Zambia Chapter 1 of the Laws of Zambia(1996)
2. Crown Proceedings Act (U.K Act of 1947)
3. European Convention for the Protection of Human Rights (1950)
4. Protection of Fundamental Rights Rules Statutory Instrument No- 156 (1969).
5. State Liabilities Act of South Africa
6. State Proceedings Act Chapter 71 of the Laws of Zambia (1965)
7. Universal Declaration of Human Rights (1948).
8. The Supreme Court Act (1981 of England)

CASES

1. Al-Adsan v.U.K ([2001]) 34 E.H.R.R 273 ECHR
2. BBC v. Johns [1965] Ch 32,79
3. Bradbury v. Enfield (1967)L.B.C 1967 1 WLR 1311
4. Clinton v. Jones 520 U.S 681(1997)
5. Emmanuel v. State of Kerala A.I.R (1952] S.C 252
6. Fose v. Minister of Safety and Security ([1997] 7 BCLR 851 CC)
7. Glasgow Corporation v. Central London Board (1956) S.C (H.L) 1
8. Gopalan v. State of Madras (1950) S.C. J p198 Indian Supreme Court
9. Hunter v. Southam 1984 2 SCR 145
10. International General Electric Co. of New York Ltd v. Commissioner of Customs and Excise, (1979) 1 All E.R. 675.
11. Kachasu v. Attorney General (1967) Z.R 145 HC

12. Kafeero & Another v. Attorney General & Another (Constitutional Petition No. 22 of [2008] UGCC)
13. Kasote v. The People (1977) ZR 75 S.C
14. Law Association of Zambia v. The Attorney General S.C.Z No.3 of [2008] (Unreported)
15. Liverslidge v. Anderson [1942] A.C 206
16. M v. Home Office [1992] QB 270
17. Marbury v. Madison 1 Cranch 137 [1803]
18. Minerva Mills v. Union of India (1981) 1 S.C.R 206
19. Minister of Home Affairs and Another v. Fisher and Another (P.C) [1980] AC 319
20. Miyanda v. Handahu (1993-1994) Z.R 187 S.C
21. Mulundika and Others v. The People (1995) S.C.Z Judgment No 25
22. Mumba v. The People (1984) Z.R 38 HC
23. Musengule v. Attorney General 2004/HP/0589 (unreported)
24. Nixon v. Fitzgerald US357 U.S 731 (1982)
25. Nyati v. Member of The Executive Council for the Department of Health, Gauteng and Others (2008)ZACC 8.
26. Osatraco (U) Ltd v. The Attorney General HCCS 1380/1986 (unreported)
27. Patriotic Party v. Inspector General of Police (Writ No 4 [1993], Supreme Court of Ghana)
28. Pumbun & Another v. Attorney General & Another (1993) 2 LRC 317
29. R v. Lewis Justices Exp. Home Secretary (1973) A.C 388
30. R v. Oake (1986) 1 SCR 103 at 261
31. R v. Secretary of State for Home exp. Brind [1991] 1 All ER 720
32. Reparation for Injuries suffered in the Service of United Nations (Reparation case) (I.C.J. Rep. 1949)
33. Rwanyarare and Others v. The Attorney General (Constitutional Application No. 6 of [2002] unreported)
34. Ryland v. Fletcher [1868]L.R 3H.L. 330
35. Spettabile Consorzio Vene Ziano di, Ermamento e Navigazione v. Northumberland Shipbuilding Co (1919) 121 L.T
36. Stickrose Pty Limited and The Permanent Secretary Ministry of Finance (S.C.Z J. No- 30 [1999] unreported).
37. The People v. Mmembe and Another 1995 S.C.Z J No- 11 (1995)
38. The Porto Alexander (1920)
39. Trendex Trading Corp. v. Central Bank of Nigeria (1977) Q.B 529 CA
40. Uganda v. Commissioner of Prisons, ex p. Matova (1966) E.A 514
41. US v. Classic, 313 US 299 (1941)

42. South Dakota v. North Carolina 192 US 268 [1940]
43. Zambia National Holdings Limited & Another v. The Attorney General (1993-1994) ZR 115 SC

BOOKS

1. Allen C.K Law in the Making (7th Ed Clarendon Press Oxford, 1983)
2. Anyangwe C. An Outline of the study of Jurisprudence (Unza 2005)
3. Anyangwe C. Introduction to Human Rights and International Humanitarian Law (Unza Press, Lusaka)
4. De Smith Judicial Review of Administrative Action (1968) Ltd 2nd Ed ,London
5. De Waal and Currie The Bill of Rights Handbook (5th Ed. Juta Cape Town 2005)
6. Dias Jurisprudence (5th Ed. Butterworth London 1985)
7. Harris,D.J Cases and Material on International Law. Sweet & Maxwell (2004)
8. Janda,Berry, Goldman and Hula: The Challenge of Democracy (5th Ed. Houghton Mifflin Company 2003)
9. Nwabueze Judicialism in Commonwealth Africa The Role of Courts in Government Hurst & Co. London 1977
10. Kapur and Misra Select Constitutions Chand & company New Delhi, (2005)India
11. Wade H.W.R Administrative Law ELBS Oxford University Press (5th ed. 1986)
12. Wade and Bradley Constitutional and Administrative Law Longman (1994)

OTHER WORKS AND PUBLICATIONS

Journals

1. Anyangwe, The Zambian Constitution and the Principles of Constitutional Autochthony and Supremacy ISSN 1027-7862, Zambia Law Journal,
2. Beyani. C International Law and the lawfulness of Derogations from Human Rights During States of Emergency in Zambia. Zambia Law Journal, UNZA, S.Ed ISSN 1027-7862
3. Motos, Failing to Score: Clinton v. Jones 36 Havard Law Journal
4. Ndhlovu, The Problem of Constitutional Interpretation in Zambia, ZTJ

5. Sullivan, Immunity versus Human Rights; The Pinochet Case. NYU Law journal, Vol. 2(2002)
6. Report of an Interdepartmental Working Group concerning Legislation on Human Rights- European Convention (1976-77) House of Lords. 81

Theses

1. Mutale, The Concept of Presidential Immunity and its Impact on Democracy (LLB 2003 Unza Directed Research)
2. Mweemba Democracy and the Law of the Constitution (LLB 2002 Unza Directed Research)